

The Drug Testing Virus*

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Résumé

S'appuyant sur une méthodologie inspirée des œuvres de Michel Foucault, l'auteur trace une «généalogie» du cadre juridique régissant les tests de dépistage de drogues en droit du travail canadien. Cela le mène à la conclusion que les origines du régime canadien se trouvent dans la «War on Drugs» aux États-Unis pendant les années 1980. Des éléments clés du modèle canadien de dépistage de drogues, telle sa justification comme moyen de réduire les accidents de travail, semblent avoir migré au Canada, malgré l'absence d'intervention législative. L'auteur propose d'expliquer cette migration avec la métaphore du virus. Enfin, il suggère qu'une recherche future qui mobiliserait cette métaphore pourrait générer un modèle explicatif applicable à d'autres phénomènes de migration juridique.

Abstract

Drawing on a methodology inspired by the work of Michel Foucault, the author traces a "genealogy" of the legal framework governing employment drug testing in Canada. This exercise leads him to claim that the origins of the Canadian regime can be found in the "War on Drugs" in the United States during the 1980s. Key aspects of the Canadian model of drug testing, including its justification as a method of reducing workplace injuries, appear to have migrated to Canada, despite an absence of legislative intervention. The author proposes the metaphor of a virus to explain this migration and suggests that further work on this metaphor may generate an explanatory model for other phenomena of legal norm migration.

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Mandatory drug testing of employees has increased significantly in prevalence among Canadian enterprises, both public and private. Up until the mid-1980s, drug testing was essentially absent from the Canadian industrial relations landscape¹. Through the 1990s, the prevalence of drug testing in Canada increased, and by 2001, approximately one in fifty Canadian employees were required to undergo drug tests as a condition of hiring². Unsurprisingly, as drug testing has increased in prevalence it has become a significant issue in Canadian labour and employment law.

Since the early decisions rendered in the 1980s, a consensus has emerged in the arbitral jurisprudence regarding the scope of allowable drug testing, crystallizing into what is now routinely referred to as “the Canadian model”³. This model – and in particular its mobilization of the notion of “safety sensitive positions” as a key component of the legal justification for mandatory drug testing – is the subject of this paper.

My principal argument is that the Canadian model is not really Canadian at all. In virtually all respects, the so-called Canadian model is in fact the U.S. model. I will show how the legal norms governing employment drug testing in Canada, and in particular the

¹ For example, an exhaustive study of the Québec jurisprudence on alcohol and drug use in the workplace, published in 1984, devotes only three paragraphs to “testing”. The paragraphs refer solely to breath testing for alcohol and makes no mention of urinalysis testing for other substances. See Claude D’Aoust & Sylvain St-Jean, *Les manquements du salarié associés à l’alcool et aux drogues: étude jurisprudentielle et doctrinale*, Montréal, École des relations industrielles de l’Université de Montréal, monographie n° 17, 1984, p. 37-38.

² Ernest B. Akyeampong, “Screening Job Applicants”, (2006) 7 *Perspectives* 5 (Statistics Canada Catalogue no. 75-001-XIE), 9-10 (the figure cited is 2.2%). The study is based on data from the *Workplace and Employee Survey* conducted by Statistics Canada in 2000 and 2001. In some industries, the figure is much higher (9.2% for the primary product manufacturing sector. *Id.*, 9). These figures are much lower than comparable estimates for the United States, where survey data for the same year indicates that 48% of employees report some form of drug testing (see UNITED STATES SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *Awareness of Workplace Substance Use Policies and Programs*, NHSDA Report, September 27, 2002, p. 2). As in Canada, the figure is much higher for the manufacturing sector (67.5%. *Id.*, p. 3, Figure 4).

³ See e.g. *Re Imperial Oil and C.E.P. Local 900*, (2006) 157 L.A.C. (4th) 225, 88 C.L.A.S. 273 (Quicklaw), ¶ 100 ff (M.G. Picher) (Ont. Labour Arbitration) [hereinafter “*Imperial Oil*” cited to C.L.A.S.].

primary justification for allowing testing – that it is a means to reduce workplace accidents – are the result of a *migration* of American legal norms. In doing so, I will demonstrate that the workplace accident justification was not the initial reason for which drug testing was implemented. Rather, the initial reasons were part of a larger moral discourse that itself created the possibility of a justification that relates drug testing to safety.

The adoption of the Canadian model occurred with little reference to the U.S. experience and it is difficult to account for this phenomenon solely with reference to conventional explanations of norm migration. I propose the metaphor of a virus to explain how Canadian law was initially “infected” with the American norms, which subsequently replicated and spread throughout the jurisprudence. Infection requires a suitable host and we will see how Canadian human rights law was suitable insofar as its structure allows for the safety justification. In order to authorize *prima facie* violations of fundamental rights in Canada, a particular kind of justification must be given; the structure of this justification appears in the “*bona fide* occupational requirement” test⁴. Because of this, safety is the strongest and perhaps only acceptable argument for mandatory drug testing; provided, of course, that a relationship between drug testing and workplace accidents can be proven.

I. Preliminary Comments

A. Scope

As indicated, this investigation is limited to the *justification* of workplace drug testing within the Canadian jurisprudence. Unsurprisingly drug testing raises a number of other legal questions which are, to varying degrees, related to this justification. For instance, the admissibility of drug test results in arbitration or other litigation will likely depend, at least in part, on the right of the employer to have required the test in the first place. Likewise, the enforceability of so-called “last-chance” or “back-to-work” agreements – whereby employ-

⁴ Also called the “*Meiorin* test” after the name of the grievor in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [hereinafter “*Meiorin*”], where the test is set out.

ees with substance-abuse problems affecting their work performance are given a final opportunity to keep their employment subject to specific conditions – often depends in part on whether the employer has the right to require drug tests⁵. These and other questions raise distinct issues that merit in-depth analysis in their own right; that is not the purpose of this paper.

The increasing prevalence of workplace drug testing can also be situated within the context of a general trend towards surveillance in the workplace, which can itself be explained in terms of the evolution of mechanisms of employer power or social control generally⁶. Again, these are important questions that deserve their own treatment; where I refer to them, it is only tangentially⁷.

Finally, this investigation is primarily concerned with the legal justification for *urinalysis* drug testing for *illegal* drugs. This is for

⁵ On these agreements generally, see Joan McEWEN, "Addressing Chemical Dependency-Related Issues in the Workplace: A Proposed Model for Workplace Health and Productivity", (1994) 2(3) *Can. Lab. L.J.* 421, 431-433; Susan CHARLTON, "Trade Union Concerns about Substance Abuse in the Workplace", (1994) 2(3) *Can. Lab. L.J.* 439, 443-444. On the right to test within the context of these agreements, see Catherine WEDGE, "Limitations on Alcohol and Drug Testing in Collective Bargaining Relationships", (1994) 2(3) *Can. Lab. L.J.* 461, 480-482. On the relative (un)usefulness of the jurisprudence regarding these agreements to the question of drug testing generally, see Rhéaume PERREAULT & Simon-Pierre PAQUETTE, "Le Dépistage d'alcool et de drogues en entreprise: où en sommes-nous?", in Service de la formation continue, Barreau du Québec, vol. 267, *Développements récents en droit du travail* (2007), Cowansville, Éditions Yvon Blais.

⁶ See e.g. John GILLIOM, *Surveillance, Privacy, and the Law: Employee Drug Testing and the Politics of Social Control*, Ann Arbor, University of Michigan Press, 1994; Elinore P. SCHROEDER, "On Beyond Drug Testing: Employer Monitoring and the Quest for the Perfect Worker", (1988) 36 *Kansas Law Review* 869; H.J. GLASBEEK & David McROBERT, "Privatizing Discipline – The Case of Mandatory Drug Testing", (1989) 9 *Windsor Y.B. Access Just.* 30; F.A. HANSON, "Some Social Implications of Drug Testing", (1988) 36 *Kansas Law Review* 899; Eugene OSCAPELLA, "Drug Testing and Privacy 'Are You Now, Or Have You Ever Been, A Member Of The Communist Party?' McCarthyism, Early 1950's – 'Are You Know, Or Have You Ever Been, A User Of Illicit Drugs?' Chemical McCarthyism, 1990's", (1994) 2(3) *Can. Lab. L.J.* 325; James R. BRUNET, "Employee Drug Testing as Social Control: A Typology of Normative Justifications", (2002) 22(3) *Review of Public Personnel Administration* 193.

⁷ See note 24, *infra*.

the simple reason that it is by far the most widespread kind of testing done by employers. Though the exclusion of prescription and “over the counter” medications from many policies indicates that testing is motivated by something other than reducing impairment at work, I do not discuss the question here. Nor do I discuss other forms biological testing, such as blood, hair, and saliva testing. Each of these methods has its own set of possibilities and limitations, some of which differ significantly from urine testing. I will not be providing a detailed analysis of the legality of each of these methods. Thus, unless I specify otherwise in the text, when I refer to “drug testing” I should be taken to mean “urinalysis testing for illegal drugs”.

B. Methodology and Theoretical Approach

The methodology that I employ in looking at the justification for drug testing is not purely positivist. By this, I mean that I will not analyse the jurisprudence solely on the basis of its internal coherence and its conformity with established legal rules⁸. This is not to say that I will not endeavour to interrogate these questions – in fact my analysis of the Canadian model pays detailed attention to the applicable legal rules and doctrines.

1. Law as Discourse, the Genealogical Approach and the Viral Metaphor

Where I venture beyond a “positivist” analysis is in my descent into the history of the safety justification in general and the notion of “safety sensitive positions” in particular. Following Michel Foucault,

⁸ In reference to H.L.A. Hart’s famous footnote where he describes five meanings of “positivism” that have been “bandied about in contemporary jurisprudence”, I mean that I will not limit myself to the perspective that “the analysis (or study of the meaning) of legal concepts is... to be distinguished from historical enquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism of law, whether in terms of morals, social aims, ‘functions’ or otherwise.” (Hart’s 3rd definition). Nor do I limit myself to the position that “a legal system is a ‘closed logical system’ in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards.” (Hart’s 4th definition). Cited from Herbert Lionel Adolphus HART, “Positivism and the Separation of Law and Morals”, (1958) 71-4 *Harvard Law Review* 593, 601-602, note 25.

I propose a *genealogical* approach. This approach rests upon a series of presuppositions that I don't have the intention of defending here, but that bear mentioning explicitly.

First, I assume that legal texts form part of a *discourse*, that is, "a limited number of statements for which we can define a series of conditions of existence"⁹. Hence my interest in the question of how statements such as "drug testing helps reduce workplace accidents" become *legal* statements within the formal structure of justification.

Second, I assume that within legal discourse, the "truth" of a statement is not determined purely by reference to its conformity with some metaphysical objective state of affairs, but by its relationship to other statements, both within legal discourse itself and in other discourses, such as scientific discourse. It follows that the "truth" of a statement is not a static and atemporal property that can be ascribed to it, but rather the *effect* of other statements; there is thus in principle a point at which a statement *became* true (each statement has, in other words, its "moment of truth"). Foucault, paraphrasing Nietzsche, describes genealogy as the search for the "factories" in which truths were "manufactured"¹⁰.

When I say that I am doing a "genealogy", what I mean is that I want to trace back some of the propositions that appear in the Canadian model. But rather than seek their origins in some foundational moment, I want to show their relationship to other propositions at other times and in other places. This is not very different from the standard notion of genealogy, which is a kind of "descent" into the past¹¹. When one traces a family tree, one is not doing history *per se*; it is rather a question of following relationships backwards. In fact, by definition, the farther one traces a family tree, the more originating nodes are uncovered. Conceiving of genealogy in this way has the following advantages:

⁹ Michel FOUCAULT, *L'archéologie du savoir*, Paris, Gallimard, 1969, p. 153. My translation from: "...un nombre limité d'énoncés pour lesquels on peut définir un ensemble de conditions d'existence."

¹⁰ Michel FOUCAULT, "La vérité et les formes juridiques", in Michel FOUCAULT, *Dits et écrits, tome I: 1954-1975*, Paris, Gallimard, 2001, p. 1406, at p. 1408-1421, esp. 1412.

¹¹ On the replacement of "origins" with "descent" in genealogy, see Michel FOUCAULT, "Nietzsche, la généalogie, l'histoire", in Michel FOUCAULT, *Dits et écrits, tome II: 1976-1988*, Paris, Gallimard, 2002, p. 143.

"Recasting origins as 'descent' enables one to think of difference rather than resemblance, of beginnings rather than a beginning, of exterior accident rather than internal truth. Searching for descent is, according to Foucault, the opposite of erecting foundations; it is to disturb the immobile, fragment the unified and show the heterogeneity of what was thought to be consistent."¹²

This captures precisely my contention: that the Canadian model is not a simple jurisprudential development based on the internal logic of Canadian law, but rather the descendent of a previous experience with multiple beginnings.

The genealogical approach is also consistent with the metaphor of viral norm migration. Two typical explanations of norm migration – transplant¹³ and harmonization¹⁴ – are predicated upon the existence of explicit efforts to import or export norms, which can be described in terms of a unified process that develops according to a linear logic departing from an identifiable moment. The spread of a virus, however, is better described in terms of a multiplicity of points of infection, which occur at different moments. The time and place of each transmission may be radically contingent and there is no *a priori* reason to expect that the spread can be described in terms of any form of relationship between them.

Though I don't have the intention of providing a detailed defence of these theoretical presuppositions, it may be useful if I provide some assurance regarding their validity. By claiming that legal statements are "truth effects" I am not proposing some sort of radical relativism or arguing that there is no such thing as truth. All I am claiming is that within legal discourse, the provenance of a statement is intrinsically linked to its truth. Lawyers work within this framework all the time; it is the very basis of the notion of *stare decisis*. Whatever fictions the ideology of the common law puts in place, no

¹² Michèle BARRETT, *The Politics of Truth: From Marx to Foucault*, Stanford, Stanford University Press, 1991, at p. 132.

¹³ Colonization provides a paradigm case, but transplant can include the adoption of foreign norms by a sovereign legislature, as in Québec's adoption of the common law instrument of the trust (art. 1260-1298 C.c.Q.).

¹⁴ For example, UNCITRAL (United Nations Commission on International Trade Law) and the NCCUSL (National Conference of Commissioners on Uniform State Laws, which is largely responsible for the U.S. Uniform Commercial Code), both of which have as explicit objectives the modification of local norms so as to provide for their uniformity.

lawyer would seriously contend that the statement, "The defendant is only liable in contract for the plaintiff's losses if they are generally foreseeable or if the damages resulting from the breach were contemplated by the parties" was *true* in any significant sense of the word before the Court of Exchequer decided so in 1854. When Baron Alderson rendered the decision in *Hadley v. Baxendale*¹⁵, it *became* true.

2. On the Distinction Between Reasons and Justifications

My analysis mobilizes the distinction between reasons and justifications. In particular, I argue that the initially stated reasons for which drug testing was adopted in the U.S. are different from the justifications that were provided during and after its implementation. Furthermore, I claim that these later justifications became in turn the reasons for implementing drug testing in Canada. Though I don't think that my broader claims in this paper stand or fall on the validity of the distinction, the way in which I intend to use these two terms bears some explanation.

A reason for acting is an intentional state related to motivation, which in turn implies an objective. Thus, the *reason* that (as the joke goes) the chicken crossed the road was that he wanted to get to the other side. His objective was getting to the other side of the road, and prior to his action he formed an intention to so, probably based on the belief that crossing the road was one way to achieve his objective¹⁶.

In contrast, a justification is a legitimating explanation for action. Thus, the chicken might have any number of justifications for crossing the road. For instance, he might say: "There is no law against crossing the road and absent such a prohibition I was free to do as I liked" (a libertarian justification). Or, he might say: "Road-crossing is the duty of all chickens" (a deontological justification). In principle, the number of possible justifications the chicken could give is limitless.

¹⁵ 9 Exch. 341, 156 Eng. Rep. 145 (1854).

¹⁶ What is described here is what John Searle calls "internal reasons" as opposed to "external reasons". There might be a series of reasons that militate in favour of crossing the road, but they are not necessarily *his* (the chicken's) reasons. See John R. SEARLE, *Rationality in Action*, Cambridge, Mass., MIT Press, 2001.

From this (admittedly silly) example, we can draw a number of conclusions, of which I am interested in two. First, having had a reason to do something (within the meaning stipulated above) is a factual question. The intentional states of actors might be hard (or even impossible) to discern, but there is in principle a “fact of the matter”. Somebody who said the chicken crossed the road because he wanted to feel the pavement on his feet would not be giving a “bad” reason, they would simply be wrong. Conversely, justifications are normative rather than factual. We might say that the chicken’s justification is “bad” or “weak” or “illegitimate” but we can’t say that it is wrong.

Second, reasons and justifications have a different temporal logic. A reason must be formed prior to (or arguably during) an action. We can’t retroactively change our reasons for having done something. Justifications, on the other hand, are admissible regardless of when they are constructed, and they are subject to change. Even if my justification is erected *post hoc*, this does not render it any less of a justification.

This relatively simple distinction is complicated by the fact that often justifications cite reasons¹⁷. For instance, the first part of the “*bona fide* occupational requirement” test discussed above is precisely that the impugned standard has been adopted for a purpose rationally connected to the performance of the job. In other words, for the standard to be justified the employer must have had a good reason to adopt it¹⁸. Note, however, that the fact that many justifications for actions rely on their antecedent reasons does not collapse the distinction.

A further complication arises from the very nature of reasons as I have defined them; they are necessarily private. If a reason is an intentional state, then there is no infallible way to verify it. This doesn’t mean that we don’t have *any* access to others’ reasons. A common way to discover them is that the person simply tells us what their

¹⁷ According to Kant, an action is *only* justified if it is done for the right reasons.

¹⁸ See also the “*Oakes* test” set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, ¶ 69: “To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. *First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.*” (emphasis added, citations omitted).

reasons for acting were (often in the context of a justification). Of course, people may be deceitful in describing their reasons for acting, but this does nothing to weaken the distinction between reasons and justifications. In any case, given my focus on discourse, I am concerned with *stated* reasons and their relationship to justifications.

A final complication arises from the fact that we often have more than one reason for a particular action. This problem is compounded when reasons are imputed to an institution that has adopted a course of action, since there may be many people who participated in elaborating the reasons for acting (and each of them may have had more than one reason). Again, since I am interested in stated reasons, this is of little consequence for my argument.

II. Safety Sensitive Positions: A Genealogy

A. American Context

As we shall see below, the advent of employment drug testing in Canada cannot be understood without reference to its prior implementation in the United States. In this section, I will provide a brief overview of the history of drug testing in U.S. I will then examine the stated reasons for the broad scale implementation of employment drug testing, with particular reference to President Reagan's Executive Order 12564, which mandated drug testing across the federal civil service. This order, and the regulations, policies, and procedures that it engendered, became the template for employment drug testing across the U.S., including in the private sector.

1. The "Pre-history" of Employment Drug Testing in the United States

The idea of urine examination as a diagnostic tool can be traced back to Hippocrates¹⁹. However, the earliest drug testing in the U.S.

¹⁹ Meryl H. HABER, "Pisse prophecy: A brief history of urinalysis", (1988) 8:3 *Clinics in Laboratory Medicine* 415, cited in Deborah L. ACKERMAN, "A History of Drug Testing", in Robert H. COOMBS and Louis Jolyon WEST (eds.), *Drug Testing: Issues and Options*, New York, Oxford University Press, 1991, p. 3 [hereinafter "*History of Drug Testing*"], at p. 6. See also, J. GILLIOM, *supra*, note 6, at p. 5.

was based on blood and breath. In the 1920s, blood and breath samples were used to identify drunk drivers; with the first “war on drugs” came the first use of biological screening for drugs²⁰. It was only in the 1950s that techniques were developed that allowed for large-scale urinalysis screening for drugs. Until the late 1960s, this technique was limited to medical uses, for instance in hospital emergency rooms and psychiatric outpatient clinics²¹.

Among the first populations to be subjected to *mass* urinalysis screening was that of veterans returning from the Vietnam War²². These tests were implemented due to the concern that many soldiers were returning from Vietnam addicted to opium or heroin. Consequently, morphine (the metabolite excreted in urine subsequent to opiate use) was the only drug for which testing was implemented²³.

The returning Vietnam veterans programme was eventually extended to the entire military, which was the first State institution to perform testing on all of its members²⁴. In early 1982, the U.S. Navy became the first branch of the armed services to put into practice a comprehensive, mandatory, mass-screening programme. Safety was an oft-repeated justification²⁵, but the following quote from (then)

²⁰ *History of Drug Testing*, *supra*, note 19, at p. 8.

²¹ *Id.*, at p. 11.

²² Olympic athletes became subject to testing at about the same time: the first testing occurred on a preliminary basis at the 1968 Olympics in Mexico City and the first comprehensive testing being done at the 1972 Olympics in Munich. See Eric D. ZEMPER, “Drug Testing in Athletics”, in R.H. COOMBS and L.J. WEST (eds.), *supra*, note 19, p. 113, at p. 114.

²³ *History of Drug Testing*, *supra*, note 19, at p. 11.

²⁴ *Id.*, at p. 12. Prisons began testing at about the same time. This is telling, since the military and prisons were identified by Foucault as two “disciplinary” institutions *par excellence*, arguing that they functioned based on a power logic of surveillance. See Michel FOUCAULT, *Surveiller et punir*, Paris, Gallimard, 1975. The other two disciplinary institutions identified by Foucault are the workplace and schools. In the 1980s, at about the same time mass employment testing was instituted, mass testing of highschool students begun. In *Vernonia School District v. Acton*, 515 U.S. 646 (1995), the U.S. Supreme Court ruled that mandatory testing for students who participate in extra-curricular activities does not violate their rights under the 4th Amendment of the U.S. Constitution.

²⁵ An aircraft crash that killed 14 people on the carrier U.S.S. *Nimitz* is often cited as the event that triggered the decision for the Navy to implement mass-screening, implying that safety was a primary reason (see *e.g.* Dennis J. CROUCH *et al.*, “A Critical Evaluation of the Utah Power and Light Company’s Substance Abuse

Rear Admiral Paul Malloy, who initiated the programme, states other reasons:

"In discussions with the CNO [Chief of Naval Operations], I recommended that "war" be declared on drugs with all that the phrase clearly implied. I believed that after Vietnam, sailors' values were confused about things such as right/wrong; legal/illegal; traditional beliefs in God, family and country; and the Navy's customs and traditions. Historically, all these things promoted pride, high morale, and sound discipline. We believed drug usage in the Navy reflected not only a societal malady but also an erosion of our traditional values..."²⁶

This concern with "traditional values" was a key stated reason for the "War on Drugs" initiated by President Reagan in the 1980s. It is the mobilization of the rhetoric of values as a reason for employment testing that we will now turn to.

2. The "War on Drugs" and the President's Report of the Committee on Organized Crime

The concern that drug use was both a symptom and a cause of the decline of "traditional values" was an important stated reason guiding U.S. drug policy during the Reagan presidency. On October 2, 1982, Reagan declared "War on Drugs" in his weekly radio address to the nation²⁷. In the address, drug use is characterized as an "epi-

Management Program: Absenteeism, Accidents and Costs", in Steven W. GUST, J. Michael WALSH and NIDA (eds.), *Drugs in the workplace: research and evaluation data*, Rockville, Md., Washington, D.C., U.S. Dept. of Health and Human Services, Public Health Service, Alcohol, Drug Abuse, and Mental Health Administration, National Institute on Drug Abuse, Supt. of Docs., U.S. G.P.O., 1989, p. 169, at p. 178. However, according to those who actually made the decision, the decision to test was made several months *before* the crash (Paul J. MULLOY, "Winning the War on Drugs in the Military", in R.H. COOMBS and L.J. WEST (eds.), *supra*, note 19, p. 92, at p. 93-94).

²⁶ P.J. MULLOY, *id.*, at p. 95.

²⁷ Ronald W. REAGAN, "Radio Address to the Nation on Federal Drug Policy, October 2, 1982", in *The Public Papers of President Ronald W. Reagan*, Ronald Reagan Presidential Library, at <<http://www.reagan.utexas.edu/archives/speeches/1982/100282a.htm>> (accessed Nov. 21, 2007) [hereinafter "*Reagan's Radio Address to the Nation*"]. "War" had actually already been declared almost ten years earlier by then President Richard Nixon. In an address to Congress regarding the establishment of the Drug Enforcement Agency, Nixon stated: "Drug abuse is one of the most vicious and corrosive forces attacking the foundations

demie” that has a deleterious effect on families. Reagan cites “stories of families where lying replaces trust, hate replaces love; stories of children stealing from their mothers’ purses...”²⁸

The War on Drugs was part of a larger anti-crime and “law and order” initiative of the U.S. government under Reagan²⁹. In mid-1983, as part of this initiative, Reagan issued an executive order establishing the President’s Commission on Organized Crime³⁰. The Commission’s mandate was to make a “full and complete... analysis of organized crime” including “the sources and amounts of organized crime’s income”³¹. It was then to report its findings to the President and the Attorney-General and “...make recommendations concerning appropriate administrative and legislative improvements and improvements in the administration of justice”³².

The Commission came to the conclusion that the primary source of income for organized crime was drug trafficking; its final report was entitled *America’s Habit: Drug Abuse, Drug Trafficking, and Organized Crime*³³. An important finding of the Commission was that, historically, U.S. drug policy had been oriented towards reducing

of American society today. It is a major cause of crime and a merciless destroyer of human lives. We must fight it with all of the resources at our command. This Administration has declared all-out, global war on the drug menace...” Richard NIXON, “Message to the Congress Transmitting Reorganization Plan 2 of 1973 Establishing the Drug Enforcement Administration, March 28th, 1973”, in John T. WOOLLEY & Gerhard PETERS, *The American Presidency Project*, Santa Barbara, University of California, at <<http://www.presidency.ucsb.edu/ws/?pid=4159>> (accessed Nov. 27, 2007).

²⁸ *Reagan’s Radio Address to the Nation*, *supra*, note 27. For other examples of Reagan’s citation of the relationship between traditional values (or “family values”) and drug use as a reason for drug policy see “Radio Address to the Nation on Teenage Drug Abuse, January 16, 1988”; “Address Before a Joint Session of Congress on the State of the Union January 25, 1988”; “Remarks Upon Arrival in Palos Hills, Illinois, November 4, 1988” (all in *The Public Papers of President Ronald W. Reagan*, *supra*, note 27).

²⁹ On the relationship between the law and order agenda, the drug war, and employment drug testing, see J. GILLIOM, *supra*, note 6, p. 31-33.

³⁰ Executive Order 12435, 48 F.R. 34723 (August 1, 1983).

³¹ *Id.*, s. 2 (a).

³² *Id.*

³³ UNITED STATES PRESIDENT’S COMMISSION ON ORGANIZED CRIME, *America’s Habit: Drug Abuse, Drug Trafficking, and Organized Crime: Report to the President and the Attorney General*, Washington, Superintendent of Documents, U.S. Government Printing Office, 1986.

the supply of drugs, notably by attempting to stop their entry into the U.S. and by the domestic repression of drug cultivation, manufacture and distribution. The Commission came to the conclusion that this focus on supply was inefficient and largely ineffective in reducing “the drug problem”³⁴. Instead, the Federal government should refocus its efforts on demand reduction³⁵.

As part of this demand reduction strategy, the Commission suggested that the workplace was a useful site of intervention. Oddly enough, it is here, in a section that deals with demand reduction in a document that deals with organized crime, and not workplace safety, that we find one of the initial sources of the notion “safety sensitive position”, as it was later to be articulated. The Commission stated:

“Efforts to combat drug abuse can also be successful in the workplace... Drug testing in certain “critical positions,” such as in the transportation industry, law enforcement, and education is particularly important.”³⁶

In the citation, the use of quotes around “critical positions” is ambiguous, and there are no references in the report that elucidate what this phrase refers to. It is clearly not intended to refer simply to workplace safety, however, given the reference to education workers.

Whatever the intended scope of “critical positions” in the Commission’s report, its recommendations unambiguously advocates employment drug testing as part of its preferred strategy of demand

³⁴ *Id.*, p. 429.

³⁵ *Id.*, p. 187-188 and 204. Interestingly, this is the same position Reagan held, even prior to declaring the “War on Drugs”. Two months into his presidency, at the first press conference in which he was asked whether he intended to have a White House drug strategy, he said: “It is my belief, firm belief, that the answer to the drug problem comes through winning over the users to the point that we take the customers away from the drugs... [I]t’s far more effective if you take the customers away than if you try to take the drugs away from those who want to be customers.” “The President’s News Conference, March 6, 1981”, in *The Public Papers of President Ronald W. Reagan*, Ronald Reagan Presidential Library, at <<http://www.reagan.utexas.edu/archives/speeches/1981/30681a.htm>> (accessed Nov. 21, 2007).

³⁶ UNITED STATES PRESIDENT’S COMMISSION ON ORGANIZED CRIME, *supra*, note 33, p. 461.

reduction. In the section “Reducing Demand for Drugs”, three recommendations stand out:

“3. The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, *including suitable drug testing programs*, expressing the utter unacceptability of drug abuse by Federal employees... Government contracts should not be awarded to companies that fail to implement drug programs, *including suitable drug testing*...

...

7. Every employer, public and private, and public education institutions of all levels should have clearly-stated policies prohibiting drug use, possession of drugs, or being under the influence of drugs on their premises. The consequences of violating these prohibitions should be clearly explained.

8. *Government and private sector employer who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program.*³⁷

The Commission’s report is not at all clear on exactly *how* drug testing is supposed to reduce demand for drugs, other than as part of a general policy of intolerance towards drug use. Perhaps they believed that the relationship was so obvious that it need not be stated. One commentator on drug testing describes it as follows:

“Testing threatens millions of Americans with the speedy, inexpensive infliction of a sanction – unemployment – that has far more sting than the criminal penalties usually imposed for casual drug use. As a deterrent, employment testing can be extremely effective, regardless of its relation to on-the-job performance.”³⁸

3. The Beginnings of a Safety Discourse

During the three years that the President’s Commission was doing its work, drug testing had begun to appear in American industry, both private and public. By 1985, at least some major corpora-

³⁷ *Id.*, p. 483-485 (emphasis added).

³⁸ Stephen J. SCHULHOFER, “On the Fourth Amendment Rights of the Law-Abiding Public”, (1989) *Supreme Court Review* 87, at 129, cited in J. GILLIOM, *supra*, note 6, at p. 33.

tions were conducting pre-employment screening “with the stated motive of promoting occupational safety”³⁹.

During the same period, the exact phrase “safety-sensitive positions” made its first appearance. In July of 1983, the U.S. Department of Transport Federal Railroad Administration (the “FRA”) issued a notice setting out its intention to adopt regulations pertaining to alcohol and drugs in the railroad industry⁴⁰. In August of 1985, after a series of consultations with industry and employee representatives, the FRA promulgated a new set of regulations entitled *Control of Alcohol and Drug Use in Railroad Operations*⁴¹. The reasons for adopting the regulations were that, in the view of the FRA, “alcohol and drug use result in safety risks and consequences that are unacceptable”⁴². Consequently, the FRA announced that “[t]he time has come for the issuance of a clear Federal prohibition on the job-related use or possession of alcohol and other drugs by employees engaged in safety-sensitive functions”⁴³.

The *Railroad Regulations* operate on the principle that authority for mandatory drug testing is based on “reasonable cause to question the fitness of an employee engaged in a safety-sensitive function”⁴⁴. Reasonable cause, within the meaning of the regulations, comprises not only reasonable suspicion that the employee is in fact impaired, but the occurrence of an accident⁴⁵. The regulations also provide for the mandatory pre-employment screen of all retained job applicants destined to be engaged in safety-sensitive functions⁴⁶. In 1988, the *Railroad Regulations* were amended to provide for random testing of all persons occupying safety-sensitive positions⁴⁷.

³⁹ Jacques NORMAND, Richard O. LEMPERT & Charles P. O'BRIEN, *Under the Influence?: Drugs and the American Work Force*, Washington, National Academy Press, 1994, p. 175. See also Michael J. WALSH & Jeanne G. TRUMBLE, “The Politics of Drug Testing”, in R.H. COOMBS and L.J. WEST (eds.), *supra*, note 19, p. 22, at p. 30-31.

⁴⁰ 48 F.R. 30723 (July 5, 1983).

⁴¹ 50 F.R. 31508 (August 2, 1985) [hereinafter, the “*Railroad Regulations*”].

⁴² *Id.*, 31515.

⁴³ *Id.*, 31534.

⁴⁴ *Id.*, 31552.

⁴⁵ Provided for at 49 CFR § 219.301 (referenced in the *Railroad Regulations*, 31573).

⁴⁶ 49 C.F.R. § 219.501 (referenced in the *Railroad Regulations*, 31577).

⁴⁷ *Random Drug Testing; Amendments to Alcohol/Drug Regulations*, 53 F.R. 47102 (November 21, 1988).

Though the phrases “safety-sensitive position” and “safety-sensitive function” occur repeatedly in the voluminous material preceding the actual provisions of the regulations, they do not appear in the regulations themselves. Thus, in order to define “safety-sensitive”, one must look to the population of employees covered by the regulations (which, recall, are predicated on the idea that they only apply to those occupying such positions or engaged in such functions). This is found in the regulations’ definition of “covered employee”, which refers to employees “subject to the *Hours of Service Act*”⁴⁸. The *Hours of Service Act*, as it read at the time the regulations were adopted, defined such employees as individuals “engaged in or connected with the movement of any train, including hostlers”⁴⁹. Thus, “safety-sensitive” as it was first used cast a very wide net indeed.

After the FRA passed the *Railroad Regulations*, other Department of Transport agencies followed, including the Federal Aviation Administration, the Federal Highway Administration, the Coast Guard, and the Urban Mass Transportation Administration. These regulations all include the notion of “safety-sensitive position” and they all provide for mandatory pre-employment testing, testing on a periodic basis, on reasonable suspicion, after a serious accident, and randomly⁵⁰.

4. Executive Order 12564

Soon after the Commission on Organized Crime tabled its report in March of 1986, Ronald and Nancy⁵¹ Reagan addressed the nation on live television to announce a “national crusade against drug abuse”⁵². In the address, the President reiterated the relationship

⁴⁸ 49 C.F.R. § 219.5(d) (referenced in the *Railroad Regulations*, 31569).

⁴⁹ 45 U.S.C. § 61 (3)(2). A “hostler” is someone who moves locomotives while in a yard but not on the main line.

⁵⁰ John G. TYSSE & Garen E. DODGE, *Winning the War on Drugs: The Role of Workplace Testing*, Washington, National Foundation for the Study of Employment Policy, 1989.

⁵¹ On Nancy Reagan’s role on the drug war, see J. GILLIOM, *supra*, note 6, p. 29-30 (arguing that Nancy Reagan was advised by White House staff to adopt “the drug problem” as an issue in order to bolster her waning popularity, resulting in the “Just say no” campaign).

⁵² “Address to the Nation on the Campaign Against Drug Abuse, September 14, 1986”, *The Public Papers of President Ronald W. Reagan*, Ronald Reagan Presidential Library, at <<http://www.reagan.utexas.edu/archives/speeches/1986/091486a.htm>> (accessed Nov. 21, 2007).

between traditional values and drug use, stating that “[d]rugs are menacing our society. They’re threatening our values and undercutting our institutions. They’re killing our children.” Evoking the U.S. as the land of freedom constructed and a safe haven for those who escaped starvation, disease, the holocaust, and the Soviet gulags, Reagan said: “What an insult it will be to what we are and whence we came if we do not rise up together in defiance against this cancer of drugs.”

This television address was the first occasion on which Reagan made reference to a relationship between drug use and accidents, saying that “everyone’s safety is at stake when drugs and excessive alcohol are used by people on the highways or by those transporting our citizens or operating industrial equipment”⁵³. The next day, Reagan signed Executive Order 12564 – Drug-Free Federal Workplace⁵⁴, thereby subjecting over a million federal employees to random urinalysis drug testing⁵⁵.

The theme of drugs being responsible for social breakdown can be seen in the preamble of Executive Order 12564, where it is stated that “[t]he profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society”. However, the relationship to workplace safety also makes an appearance, with the statement that “[t]he use of illegal drugs, on or off duty, by Federal employees... can pose a serious health and safety threat to members of the public and to other Federal employees”. The remainder of the Order is premised on the position that “[p]ersons who use illegal drugs are not suitable for Federal employment”⁵⁶. It mandates

⁵³ This was to become an increasingly explicit theme. See *e.g.* “Remarks at a Seminar on Substance Abuse in the Workplace in Durham, North Carolina, February 8, 1988”, *The Public Papers of President Ronald W. Reagan*, Ronald Reagan Presidential Library, <<http://www.reagan.utexas.edu/archives/speeches/1988/020888b.htm>> (accessed Nov. 22, 2007), and “Remarks at the National Conference on Corporate Initiatives for a Drug Free Workplace, June 9, 1988”, <<http://www.reagan.utexas.edu/archives/speeches/1988/020888b.htm>> (accessed Nov. 22, 2007).

⁵⁴ 51 F.R. 32889, 3 C.F.R., 1986 Comp., p. 224.

⁵⁵ The figure cited in from J. GILLIOM, *supra*, note 6, p. 30 is 1.2 million. In R.M. TOBIAS, “You’re in Government? Urine Trouble”, in B.N.A., (ed.), *Employee Testing*, Washington, Bureau of National Affairs, Inc., 1988, IV-93, the figure cited is 1.1 million.

⁵⁶ Executive Order 12564, *supra*, note 54, s. 1 (c).

the head of each executive agency to develop a programme to eradicate drugs from the workplace, including through the use of drug testing⁵⁷.

In addition to authorizing mandatory screening for *all* applicants to the Federal civil service⁵⁸, the order authorizes mandatory testing where: (1) there is a reasonable suspicion that an employee uses illegal drugs, (2) it is conducted in the course of an investigation into an “accident or unsafe practice”, and (3) it is part of a counselling or rehabilitation programme related to employment (*i.e.* an Employee Assistance Programme)⁵⁹.

Whereas in the above cases the agency head is *authorized* to implement testing, there is one section of the Order that *requires* a testing programme. Section 3(a) of the Order states:

“(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions...”

After the appearance of “critical positions” in the Report of the President’s Commission on Organized Crime, we now see “sensitive positions” in the Executive Order that implements the Commission’s recommendations. There appears, however, only to be a loose connection to the notion of “safety-sensitive position” adopted by the Federal Railroad Administration. The definition of “sensitive positions” is found in Section 7 (d) of the Order, which states:

“(d) For purposes of this Order, the term ‘employee in a sensitive position’ refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order 12356;

⁵⁷ *Id.*, s. 2.

⁵⁸ *Id.*, s. 3 (d).

⁵⁹ *Id.*, s. 3 (c).

- (3) Individuals serving under Presidential appointments;
- (4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and
- (5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.”

The notion of “sensitive” deployed here is broad; vast even. Positions are sensitive if they have the potential for “inestimable”, “exceptionally grave”, “serious”, or “moderate” adverse impact on the efficiency of the agency or service⁶⁰. Positions are sensitive if their occupants could bring about “... a material adverse effect on the national security”⁶¹. Positions held under Presidential appointment, in law enforcement or that require access to classified documents are also sensitive. Note that s. 7(d)(5) appears to be a catch-all category that covers positions that might have been missed by the previous four subsections. The order does reference safety, though it is not in terms of *workplace safety*, but rather *public safety*.

The adoption of workplace safety as a primary justification for generalized drug testing is clear in the administrative guidelines that implemented Executive Order 12564.

5. Federal Personnel Manual Letter 792-16

A little over two months after President Reagan signed, the U.S. Office of Personnel Management circulated *Federal Personnel Manual*

⁶⁰ These are the definitions of “Special-Sensitive”, “Critical-Sensitive”, and “Non-Critical Sensitive” that appear in Chapter 731 of the Federal Personnel Manual, referred to in 7(d)(1). See U.S. CIVIL SERVICE COMMISSION & U.S. OFFICE OF PERSONNEL MANAGEMENT, *Federal Personnel Manual*, Washington, Office of Personnel Management, Supt. of Docs., U.S. G.P.O., 1956, p. 731-7 and 731-8.

⁶¹ This is the definition of “sensitive position” found at s. 4 (b) of Executive Order 10450 of Apr. 27, 1953, 18 F.R. 2489, 3 C.F.R., 1949-1953 Comp., p. 936, which is referred to in 7(d)(1). Drug use was already prohibited for occupants of these positions, along with “...criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, ...[or] sexual perversion” (at s. 8(a)(1)(iii) of Executive Order 10450). For the implementation guidelines of Executive Order 10450, see Chapter 732 of the U.S. CIVIL SERVICE COMMISSION & U.S. OFFICE OF PERSONNEL MANAGEMENT, *supra*, note 60.

Letter 792-16, as directed by the President⁶². Such letters are supplements to be added to the loose leaf *Federal Personnel Manual* ("FPM"), which is a series of guidelines that are in the nature of employer policies, rather than the result of a delegated power of regulation⁶³. The Office of Personnel Management describes such letters as follows:

"FPM Letters generally are advisory guidance for supervisors and personnel specialists to use as management tools and ordinarily would not be published under formal rulemaking procedures."⁶⁴

In the introduction to *FPM Letter 792-16*, which – it should be noted – purports to interpret and implement, but not add to, Executive Order 12564, the justification for drug testing contains the following passage:

"Employees who use illegal drugs have three to four times more accidents while at work. Federal workers have the right to a safe and secure workplace, and all American citizens, who daily depend on the work of the Federal government for their health, safety and security, have the right to a reliable and productive civil service. Federal agencies must take action for the protection of individual drug users, their co-workers, and the society at large. In recognition of this, President Reagan, in Executive Order 12564, set forth

⁶² Executive Order 12564, *supra*, note 54, stipulates, at s. 6(a)(1), that the Office of Personnel Management (the successor agency to the U.S. Civil Service Commission) shall "[i]ssue government-wide guidance to agencies on the implementation of the terms of this Order".

⁶³ This was not lost on unions who contested *FPM Letter 792-16* on the grounds that it did not meet the notice and comment requirements of the Federal *Administrative Procedure Act*, 5 U.S.C. § 553. In *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346, at 1355, the U.S. District Court found that "FPM Letter 792-16... guides agencies on implementation of the Executive Order and is a binding legislative rule. The *Federal Personnel Manual Letter* was not issued in accordance with the *Administrative Procedure Act* and is invalid." When the union sought to have the implementation of *FPM Letter 792-16* halted until the notice and comment requirements had been met, the Court refused, citing that "...due to the strong interests promoted by drug testing of sensitive public employees... it would be unnecessarily disruptive to enjoin implementation of the plans while the agencies comply with the APA procedures." Instead, the Court simply ordered the Office of Personnel Management to notify the plaintiff union and accept its comments. (1988) WL 106328: WestLaw, 1.

⁶⁴ *Federal Personnel Manual Letter 792-19*, (1989) 54 F.R. 47324-01.

the policy of the United States Government to eliminate drug use from the Federal workplace.”⁶⁵

Here we can clearly see how the initial stated reasons for the implementation of mass drug testing in the Federal civil service gave way to a different justification.

B. From Moral Crusade to “Safety-Sensitive Positions”

In the initial programme in the military, the report of the Commission on Organized Crime, and Reagan’s public statements on the drug war, values were an organizing principle. Drugs were an “epidemic” or “societal malady” that ravaged “families” by “eroding traditional values” and sustaining organized crime. Drug testing was proposed as one way to combat the “drug problem” as a component of a general demand reduction strategy implemented in a particularly effective site of regulation – the workplace. In so far as safety was an issue, it was primarily limited to the transportation sector.

Executive Order 12564 symbolically marks the shift from a relatively localized phenomenon concerned primarily with public safety in particular sectors, to a massively generalized norm applicable to vast swaths of the population⁶⁶. On the other hand, the context of its adoption and later interpretation demonstrate the complex interplay between the rhetoric of morality and values, mobilized as a reason for introducing testing and safety, which justifies it⁶⁷. In the order,

⁶⁵ *Federal Personnel Manual Letter 792-16*, at s. 1 (b) (reprinted in Appendix 4 of Craig M. CORNISH, *Drugs and Alcohol in the Workplace: Testing and Privacy*, Wilmette, Ill., Callaghan, 1988, p. 272). The figure of “three to four times more accidents while at work” has been traced to a “study” allegedly done at Firestone Tire and Rubber Company in 1973. Researchers have conclusively demonstrated that this “study” was in fact never done, and that the figure was simply made up. For the story behind this fictional data and its use by the U.S. government, see John P. MORGAN, “The ‘Scientific’ Justification for Urine Drug Testing”, (1988) 36 *U. Kan. L. Rev.* 683, 683-685; AMERICAN CIVIL LIBERTIES UNION, *Drug Testing: A Bad Investment*, New York, ACLU Department of Public Education, 1999. See also J. GILLIOM, *supra*, note 6, p. 40-43.

⁶⁶ Note that on the same day Reagan signed Executive Order 12564 he transmitted to Congress a draft bill, the *Drug-Free America Act*. It would evolve into the *Drug Free Workplace Act*, 41 U.S.C. 701 (1988), which requires those contracting with the Federal government to adopt a series of anti-drug measures targeting their employees.

⁶⁷ On drug testing as an exercise in symbolism, see Steven WISOTSKY, “The Ideology of Drug Testing”, (1987) 11 *Nova Law Review* 763.

the theme of morality coexists with a certain number of references to safety, though generally in the context of public safety rather than occupational safety. With *FPM Letter 792-16*, safety (along with productivity) becomes a central justification for drug testing.

I do not mean to say that safety was simply an afterthought cynically mobilized for propaganda purposes. Clearly, the relationship between drug use and safety was a primary concern in the formulation of the *Railroad Regulations*. What I do want to claim is that the discourse of values was a condition of possibility⁶⁸ for a discourse of safety.

During the early period of the “drug war”, there was a significant and sustained production of knowledge around drugs that was organized around the concept of the *harm* that drugs cause. Starting from the principle that drugs are both a cause of and a consequence of a general corruption of society, researchers sought to discover, catalogue and organize understanding of the particular harms that drugs cause⁶⁹. Workplace accidents were one of the harms that

⁶⁸ Other conditions include the technology to test (for without testing, the production of knowledge about use is severely limited), which was predicated on the existence of a drug testing industry with economic incentives to develop not only the “solution” of drug testing, but the “problem” of drugs in the workplace. On these factors, see Lynn ZIMMER & James B. JACOBS, “The Business of Drug Testing: Technological Innovation and Social Control”, (1992) 19 *Contemporary Drug Problems* 1; Kenneth D. TUNNELL, *Pissing on Demand: Workplace Drug Testing and the Rise of the Detox Industry*, New York, NYU Press, 2004. This nexus between technology, knowledge, economic incentives and institutional goals offers the possibility of theorizing drug testing in terms of what Michel Foucault called a *dispositif* (“dispositive”). On dispositive analysis, see Lawrence OLIVIER, “La question du pouvoir chez Foucault: espace, stratégie et dispositif”, (1988) 21(1) *Canadian Journal of Political Science / Revue canadienne de science politique* 83, esp. 92-93; see also Giorgio AGAMBEN, *Qu'est-ce qu'un dispositif?*, Paris, Rivages, 2007.

⁶⁹ A parallel can be seen with the temperance movement of the late 19th and early 20th centuries. The conception of alcohol as a moral disorder (both of individuals and of society generally) led to a significant production of knowledge around the mechanisms by which it caused harm. For examples of this research, see e.g. William HARGREAVES, *Alcohol and Science, or, Alcohol: What it is and What it Does*, New York, National Temperance Society and Publication House, 1882; Alonzo Benjamin PALMER & Mary A.R. LIVERMORE, *The Temperance Teachings of Science: Adapted to the use of teachers and pupils in the public schools*, Boston, D. C. Heath, 1886. For a discussion on the similarities between the Canadian temperance movement and the drug war in the 1980s, see Anton R.F. SCHWEIGHOFER, “The Canadian Temperance Movement: Contemporary Parallels”, (1988) 3 *CJLS/RCDS*

became a possible object of study once the moral discourse had posed these parameters.

The strength and pervasiveness of the category of “harm” is attested to by the fact that it organized debate around drug policy across the spectrum. Those who argued against prohibition as a method of regulating “the drug problem” called for its redefinition in terms of “a public health” issue rather than a moral one. The common appellation of this position is a “harm reduction strategy”⁷⁰.

This production of knowledge about drug harms was (and remains) an explicit policy of the U.S. government. It was largely accomplished through the National Institute on Drug Abuse (“NIDA”), which was established in 1972 as a branch of the U.S. Health Department⁷¹. Workplace drug use became a subject of interest for the NIDA in the 1980s:

“...[NIDA] played an important role in shaping employers’ beliefs regarding both these issues [that employee drug use was a problem and that drug testing offered a solution]. Throughout the 1980s NIDA provided funding to researchers studying the workplace drug problem, and by 1990 it had sponsored four national conferences on the topic. Even before President Reagan ordered the testing of federal workers, NIDA had funded the development of new drug-testing technologies and had urged public and private employers to adopt testing programs.”⁷²

Former NIDA scientists have said that it was made clear to funding applicants that only research into harms, and not benefits, of drugs would receive grants⁷³.

This research programme produced a certain number of “truths” about the relationship between drug use and safety. It also allowed

175. On the role of social research in policy formation in Canada, see Patricia G. ERICKSON, “Neglected and Rejected: A Case Study of the Impact of Social Research on Canadian Drug Policy”, (1998) 23(2-3) *Can. J. Soc.* 263.

⁷⁰ See e.g. the anti-prohibition U.S. Drug Policy Alliance, at <<http://www.drug-policy.org>>.

⁷¹ Helen PEARSON, “Science and the war on drugs: A hard habit to break”, (2004) 430 *Nature* 394, 394.

⁷² L. ZIMMER & J.B. JACOBS, *supra*, note 68, 16 (references omitted).

⁷³ H. PEARSON, *supra*, note 71, 395. This comment was regarding drug research generally, and not the question of drugs in the workplace *per se*.

safety to become a central justification for drug testing. If drug use causes accidents, then eliminating drug users from positions in which accidents can have catastrophic consequences appears justified. This is the central position that came to structure the disparate notions of “critical positions”, “sensitive positions” and “safety-sensitive positions”.

That drug testing is a method to promote safety – in particular by reducing the risk of accidents that cause harm to the public or to workers – became the gold standard of justifications. Defence of drug testing on these grounds was invariably accompanied by claims that “scientific” studies demonstrate a causal relationship between drug testing and reduced accident rates. The following passage from *Winning the War on Drugs: The Role of Workplace Testing* is typical:

“[T]he overwhelming evidence establishes that workplace drug testing, as part of an anti-drug abuse program, does in fact deter illegal drug use both on and off the job. Drug testing has been shown to be effective in preventing the negative consequences of workplace drug abuse, including those situations where drug-induced impairment threatens the life of the employee, fellow workers, or the public at large.”⁷⁴

In fact, there was very little peer-reviewed research clearly relating drug testing to accidents. What little research there was in the early 1980s was either so methodologically unsound as to be totally useless, or inconclusive⁷⁵. But the scientific validity of claims relating drug testing to accidents was to become a somewhat moot point. For the reasoning that drug use causes accidents and that there-

⁷⁴ G.J. TYSSE & G.E. DODGE, *supra*, note 50, p. 14.

⁷⁵ See references at note 65, *supra*. More recent research has found a very weak correlation or none at all. See, e.g. Jacques NORMAND, Stephen SALYARDS & John MAHONEY, “An Evaluation of Preemployment Testing”, (1990) 75(6) *Journal of Applied Psychology* 629, 635 (finding that “no statistically significant relationship was detected between drug-test results and number of injuries”); Rebecca S. SPICER, Ted R. MILLER, & Gordon S. SMITH, “Worker Substance Use, Workplace Problems and the Risk of Occupational Injury: A Matched Case-Control Study”, (2003) 64 *Journal of Studies on Alcohol* 570, 575 (finding that there appeared to be a correlation but that “[b]oth substance users and risk-takers were more likely to be injured. However only risk taking was a significant predictor of injury when substance use was controlled for.”). See also Cheryl J. CHERPITEL, “Substance Use, Injury, and Risk-Taking Disposition in the General Population”, (1999) 23-1 *Alcoholism: Clinical and Experimental Research* 121 (finding that risk-taking and impulsivity are better indicators of injury than substance use).

fore drug tests will prevent them became *legally* true when the U.S. Supreme Court cited safety as the principle justification for allowing mass drug testing in employment.

The safety justification was finally endorsed by the U.S. Supreme Court in *Skinner v. Railway Labor Executives Association*⁷⁶. It was in this case that the Court upheld the Federal Railroad Administration regulations requiring testing of those in safety-sensitive positions. The Court found that urine tests constitute searches within the meaning of the 4th Amendment of the Constitution⁷⁷. Relying upon the “special needs doctrine”, which allows searches without a warrant even in the absence of individualized suspicion, the Court proceeded to balance the government interest in testing against the privacy interest of employees. Justice Kennedy, for the majority, concluded that:

“The Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”⁷⁸

Shortly thereafter, the Court rendered its decision in *National Treasury Employees Union et al. v. Von Raab*⁷⁹, in which it confirmed the constitutionality of mandatory testing for customs agents. The Court found that the tests were justified because the “Customs Service is our Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population”⁸⁰, and because customs agents carry firearms, which raise significant safety concerns⁸¹.

It was this reasoning, linking drug testing to safety, that guided the adoption of drug testing programmes in Canada subsequent to the U.S. experience. As we shall see in the following section, the Canadian model is in fact a direct descendent of the legal framework governing drug testing in the U.S.

⁷⁶ 489 U.S. 602 (1989) [hereinafter “*Skinner*”].

⁷⁷ *Id.*, 617.

⁷⁸ *Id.*, 628.

⁷⁹ 489 U.S. 656 (1989).

⁸⁰ *Id.*, 668.

⁸¹ *Id.*, 670, 672.

III. The Canadian model

The designation of the generally accepted legal principles governing drug testing in Canada as the Canadian model is recent. This “model” is portrayed as the natural consequence of jurisprudential accumulation resulting in the crystallization of a stable set of rules according to an inherent logic. In this section, I will argue that this origin story is misleading, if not outright false. Instead, I claim that the Canadian jurisprudence is, and was from the very beginning, a derivative of the U.S. model. The model migrated northwards through multiple mechanisms at multiple moments, each of which constitutes a “point of infection” at which the U.S. model was transmitted. The spread of the “drug testing virus” also occurred laterally through the Canadian jurisprudence, allowing its origins to be covered over.

The existence of the Canadian model, and its characterization, was recently described in a lengthy arbitration decision by arbitrator M. G. Picher. Picher describes the “development” of the model as follows:

[98] It is fair to say that over time the arbitral jurisprudence in Canada has developed relatively clear lines as to what constitutes an acceptable drug and alcohol testing policy in a safety sensitive workplace which is governed by a collective bargaining regime...

[99] The... jurisprudence has come to be viewed as tantamount to a Canadian code for drug testing in a safety sensitive workplace governed by collective bargaining, the regime by which terms and conditions of employment must be negotiated between employers and unions. They have become widely accepted and applied. Indeed, the drug testing policies and limitations fashioned within that jurisprudence came to be recognized as the Canadian model as adopted in the construction industry in Alberta.

[100] At the risk of oversimplification, the Canadian model for alcohol or drug testing in a safety sensitive workplace as developed in the arbitral jurisprudence generally contains a number of elements as summarized below:

- No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitative program.
- An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.
- It is within the prerogatives of management's rights under a collective agreement to also require alcohol or drug testing following

a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.

- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use... This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interests of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.
- The cases generally recognize that an employee's refusal or failure to undergo an alcohol or drug test in the three circumstances described above may properly be viewed as a serious violation of the employer's drug and alcohol policy, and may itself be grounds for serious discipline."⁸²

Though this description of the model is accurate, it obscures its provenance by characterizing it as a simple jurisprudential evolution. In fact, the model can be traced to the U.S., and it is not so much a development of Canadian law as it is a set of norms that migrated north and was subsequently ratified by the jurisprudence. I have identified two primary "points of infection". First, the various transportation guidelines adopted by the U.S. Department of Transportation began to filter through to the Canadian transportation industry, from whence they spread to other industries. Second, U.S.-based companies with Canadian operations applied their drug testing policies to their Canadian employees.

A. Migration From the United States: The Virus Spreads

Drug testing was well underway in the U.S. before it became a major issue in Canada. Despite Prime Minister Mulroney's announcement – the day after Reagan signed Executive Order 12564 – that Canada was afflicted with a "drug epidemic"⁸³, employment drug testing was not the immediate response. "On the whole, the Canadian

⁸² *Imperial Oil*, *supra*, note 3, references omitted.

⁸³ Eric L. JENSEN & Jurg GERBER, "State Efforts to Construct a Social Problem: The 1986 War on Drugs in Canada", (1993) 18(4) *Canadian Journal of Sociology* 453, 454. See also Lennard E. HENRIKSSON, "The Unconvincing Case for Drug Testing", (1991) XVII(2) *Canadian Public Policy – Analyse de Politiques* 183, 185 [hereinafter "*Unconvincing Case for Drug Testing*"]. Henriksson reports that Mulroney later claimed the timing was purely coincidental.

business community and professional groups were reluctant to follow the American lead on the testing issue.”⁸⁴ One notable exception was the transportation industry, to which we now turn.

1. Norms on Rails: Drug Testing and the Canadian Railroad Industry

A national consultation on substance abuse in the workplace held by Health Canada in 1988 found that the transportation industry believed testing to be an important tool in reducing accidents. The report describes their position as follows:

“[R]epresentatives from the transport industry... expressed an urgent need for more measures to control alcohol and drug use in their own activities because of public safety... They believed their personal experience, specially collected data, and U.S. studies demonstrated that the potential adverse impacts were serious enough to require more immediate action than normal programs [i.e. those without a testing component] could deliver.”⁸⁵

The report goes on to state that rail employers believed there to be a link between substance abuse and accidents, particularly with regard to “safety-sensitive positions”, and that consequently they had already begun testing⁸⁶.

Not only had testing already begun in the railway industry, but the testing in the railway industry led to the very first arbitration cases dealing with drug testing in Canada. Four months prior to the consultation held by Health Canada⁸⁷, the Canadian Railway Office

⁸⁴ *Unconvincing Case for Drug Testing*, *supra*, note 83, 184. See also GOVERNMENT OF CANADA, *National Drug Strategy: Action on Drug Abuse*, Ottawa, Queen's Printer, 1987 (drug-testing not part of the national drug strategy) and B. HALLIDAY, *Booze, Pills & Dope: Reducing Substance Abuse in Canada: Report of the Standing Committee on National Health and Welfare on Alcohol and Drug Abuse*, Ottawa, Queen's Printer, 1987 (conceding that reasonable cause testing may be desirable in some circumstances, but that random testing was to be proscribed).

⁸⁵ CANADA (MINISTER OF NATIONAL HEALTH AND WELFARE) & NIAGARA INSTITUTE, *Report of the National Consultation on Substance Abuse and the Workplace*, Ottawa, Ministry of Supply and Services Canada [cat. H21-101/1988], 1988, p. 21 [hereinafter “*National Consultation*”].

⁸⁶ *Id.*

⁸⁷ The consultations were held on February 14-16 and 21-23, 1988, *National Consultation*, *supra*, note 85, p. 51-52.

of Arbitration & Dispute Resolution (the "CROA"⁸⁸) rendered the first two decisions in Canada on drug testing⁸⁹.

In the *Hutchinson* case, the grievor was a train conductor who had been charged with the cultivation of a substantial quantity of marijuana – a charge that was subsequently stayed for reasons unrelated to the strength of the Crown's case. His employer, Canadian Pacific, ordered him to submit to urinalysis screening, which he refused. Though there was no evidence that he had ever been impaired at work, the company terminated his employment on the grounds that participation in "the drug culture" was incompatible with his employment. With regard to the relationship between off-duty drug use and employment, Arbitrator Picher stated:

"This case raises, in vivid terms, the issue of the obligations of a railroad in respect of the involvement of its employees in the production, trafficking, possession or use of illegal drugs. There was a time, in the 1960's, when a substantial body of opinion held that "soft" drugs, and marijuana in particular, were relatively benign substances whose use posed no substantial threat. Those days are gone. *Two decades of experience with accidents, both industrial and non-industrial, sometimes tragic in their proportions, caused by the use of prohibited drugs, have gradually affirmed the conclusion that involvement with illegal drugs, including marijuana, poses a dangerous threat to health and safety.*"⁹⁰

Though Mr. Hutchinson's refusal to submit to a drug test was not invoked as a reason for termination *per se*, Arbitrator Picher discussed the issue in his award. He reviewed the state of the law in the United States, with particular reference to the *Railroad Regulations*, noting that "[t]he American regulation seeks, insofar as possible, to balance the interest of the railway to ensure safe operations with the interest of the employee not to be unduly deprived of rights

⁸⁸ The CROA is a consensual arbitration tribunal established by memorandum of agreement in 1965, under the *Canada Labour Code*. Both major railways in Canada, the Canadian National Railroad (CN) and the Canada Pacific Railroad (CP), and their various unions are parties to the memorandum. See the CROA web site at <<http://www.croa.com>>.

⁸⁹ *Canadian Pacific Ltd. v. U.T.U. (Hutchinson grievance)*, (1987) 31 L.A.C. (3d) 179; [1988] C.L.A.D. No. 61, CROA Case No. 1703 (M.G. Picher) [hereinafter "*Hutchinson*" cited to CROA] and *Canadian Pacific Ltd. v. U.T.U. (Keal grievance)*, (1987) 7 C.L.A.S. 44, CROA Case No. 1704 (M.G. Picher) [hereinafter "*Keal*" cited to CROA].

⁹⁰ *Hutchinson*, *supra*, note 89, p. 2-3, emphasis added.

of personal dignity and privacy”⁹¹. He recognized that there are no comparable regulations in Canada nor any reported decision on the issue of drug testing. He then went on to state:

“Where, as in the instant case, the employer is a public carrier, and the employee’s duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.

[...]

What guidance do the foregoing considerations provide in the instant case? It appears to the Arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test... The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired... On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing...”⁹²

Three important features of this passage bear discussing. First, safety is unequivocally the justification for drug testing. The notion of safety-sensitive positions is mobilized (for the first time in Cana-

⁹¹ *Id.*, p. 4.

⁹² *Hutchinson, supra*, note 89, p. 4-5. I have heavily edited the quoted section for length, which inevitably excises some of the nuance. However, I am confident that readers who consult the full text of the award will agree that I have not denatured its meaning.

dian jurisprudence)⁹³ and appears to have the same scope as in the U.S. *Railroad Regulations*, that is “employees who are responsible for the movement of trains”. Second, the extent of permissible testing and the consequences for the employee mirror with almost perfect precision the U.S. *Railroad Regulations* in force at the time of the award (recall that the award was rendered in 1987 and the U.S. *Railroad Regulations* were not amended to allow for random testing until 1988)⁹⁴. Finally, this passage contains the basic framework of the Canadian model as it was articulated almost twenty years later; a model that was described as having evolved over time.

The same arbitrator rendered the *Keal* decision on the same day as the *Hutchinson* decision. The award is significantly shorter and simply relies on *Hutchinson* for its authority. Arbitrator Picher found that Mr. Keal occupied a safety-sensitive position and that his arrest for marijuana possession two hours prior to the beginning of his shift, coupled with his refusal to submit to a drug test, justified his dismissal by Canadian Pacific⁹⁵.

The *Hutchinson* and *Keal* decisions demonstrate how the viral metaphor accounts for the migration of drug testing norms. Arbitrator Picher explicitly recognizes that no Canadian legislature decided to import the American norms. Yet they were transmitted to Canada. First, by the railways themselves, who implemented testing after relying on U.S. data to conclude that testing was necessary. Second, the U.S. *Regulations* and jurisprudence provided the framework within which Arbitrator Picher could conclude that drug testing was legitimate. Third, the immediate reliance on *Hutchinson* in *Keal* without reference to the American norms demonstrates that once a “host” legal system is infected, the virus can replicate and spread laterally across the jurisprudence.

This lateral spread continued. In the late 1980s and early 1990s, the *Hutchinson* decision was routinely cited as the setting out the principles governing drug testing in Canada, though often without

⁹³ But see *Re Canadian Pacific Ltd. v. Rail Canada Traffic Controllers* (Sidoni grievance), (1981) CROA Case No. 946 (Weatherill), p. 2, where it was found that a diagnosed alcoholic could not return to work after absence for treatment unless he was first certified as fit for duty by a doctor, since the duties of a rail traffic controller “...impinge so directly upon the safety of operations.”

⁹⁴ See text accompanying note 46, *supra*.

⁹⁵ *Keal*, *supra*, note 89, p. 2.

reference to its U.S. origins⁹⁶. As these principles spread beyond the railroad industry, so did the notion of “safety-sensitive positions”. From the initial justification of the risk of catastrophic train wrecks, any job with the possibility of injury began to be characterized as safety-sensitive. For instance, in the *City of Winnipeg* case the city sought to impose random testing on a garbage collector who had been found smoking marijuana on the job. The safety concerns related to garbage collection are described as follows:

“The grievor works in assisting the loading of a collection vehicle... The helpers pick up refuse and load it into a rear collector, which has a compactor in the back of the hopper of the vehicle. A refuse helper must be certain that he and others are clear of this mechanism when the machine is being operated. Occasionally, members of the public may be around when refuse is being thrown into the truck and must be kept away. Employees have been injured because of not being clear of the vehicle and injuries can be serious, such as a loss of a hand. The grievor is also required to guide the driver of the truck when backing up.”⁹⁷

Citing *Hutchinson*, the arbitrator concluded that there was “a legitimate concern over safety”⁹⁸ and that the city was justified in imposing the drug tests.

This indirect effect of the U.S. Department of Transport regulations was coupled with a direct effect. In several decisions, arbitrators were faced with the fact that workers in the transportation industry engaged in cross-border traffic were apparently subject to the U.S. regulations⁹⁹. Thus, the question arose as to whether a violation of U.S. regulations was just cause for discipline by a Canadian employer.

⁹⁶ See, e.g. *Re Canadian National Railway Co. and U.T.U.*, (1989) 6 L.A.C. (4th) 381; 14 C.L.A.S. 74 (CROA, M.G. Picher); *Re Quintette Coal Ltd. and U.S.W.A., Local 9113 (Regensberger grievance)*, (1989) 14 C.L.A.S. 2 (A. Hope); *Re Inco Ltd., Manitoba Division and U.S.W.A., Local 6166*, [1989] C.L.A.S.J. 557689 (Carr); *Re Provincial-American Truck Transporters and Teamsters, Local 880*, (1991) 18 L.A.C. (4th) 412 (Brent) [hereinafter *Provincial-American Transport*]; *Re Winnipeg (City) and C.U.P.E., Loc. 500*, (1991) 23 L.A.C. (4th) 441 (Baizley) [hereinafter, *City of Winnipeg*]; *Re Cominco Ltd. and U.S.W.A., Local 480*, [1993] C.L.A.S.J. 584223 (Williams).

⁹⁷ *City of Winnipeg*, *supra*, note 96, 443.

⁹⁸ *Id.*, 446.

⁹⁹ This was technically not the case. The U.S. government gave diplomatic assurances that no Canadian-based transport employees would be subject to the regulations, pending the adoption of Canadian regulations. The Canadian government

Again, this trend started with a CROA decision rendered by Arbitrator Picher in the railway industry. In that decision¹⁰⁰, the grievor, Mr. Bernier, was required by U.S. officials to undergo urinalysis after he injured his hand replacing a light on a train. The test was positive for marijuana metabolites and the company dismissed Mr. Bernier for "conduct incompatible with his duties". Arbitrator Picher found that the *Railroad Regulations* could not be blindly applied to Canadian employees:

"It should be noted that there is no federal regulation in Canada regarding the detection of drugs in the railway industry. Furthermore, to date the Company has issued no internal regulation on this subject. The presumption of impairment, invoked in the American regulation by a positive urine test, has no basis in logic or in science. It is admitted that this test demonstrates only the use of a drug during the sixty days prior to the taking of the sample. It provides no precise information concerning when, where or in what quantity the drug was taken. Therefore, the presumption of impairment is a legal construction decreed for the particular purposes of the American regulation. This same regulation also allows the employee to take advantage of a blood test to refute the presumption that he, or she, was working while under the influence of drugs. In sum, this is a question of a very specialized and extraordinary regulation in the field of working conditions.

There is nothing similar in the Company's regulations in Canada for the purposes of discipline in general. In the Arbitrator's view, in the absence of a regulation which explains clearly to employees who violate the American regulation that not only could they be forbidden to work in the United States but could also be discharged from the

responded by tabling draft legislation, which was referred to the Standing Committee on Transport. Transport Canada adopted virtually all of the Committee's recommendations, and draft regulations were adopted by Cabinet. The proposed legislation and ratification of the draft regulations died on the order table after the defeat of the Conservative government in 1993. See generally Mel F. BELICH & Michael J. SCHEWCHUK, "Drug Testing in the Transportation Sector: An Employer Perspective", (1994) 2(3) *Can. Lab. L.J.* 516. See also, *Unconvincing Case for Drug Testing*, *supra*, note 83, 185. On Transport Canada's response to the Standing Committee's recommendations, see Transport Canada, *Substance Use in Safety-Sensitive Positions in Canadian Transportation: Government Response to the Third Report of the Standing Committee on Transport*, Ottawa, November 7, 1990 [Document No. TP 10694].

¹⁰⁰ *Re Canadian National Railway and U.T.U. (Bernier)*, (1990) 11 L.A.C. (4th) 364, CROA Case No. 2025 (M.G. Picher) [hereinafter *Bernier*, cited to CROA].

Company in Canada, it is difficult to justify the dismissal of an employee for this reason alone."¹⁰¹

Mr. Bernier was re-instated, but under the condition that he "agree" to undergo period unannounced urine or blood testing. He was also forbidden from working in the U.S. "unless the American authorities permit it and unless the company, at its sole discretion, allows him to do so"¹⁰².

Whereas the *Hutchinson* case notes the absence of transplant attempts, the *Bernier* case shows the failure of harmonization attempts as a mechanism of norm migration. The Canadian railways attempted to harmonize their labour practices with the U.S. *Railroad Regulations*, but apparently ran up against a Canadian jurisprudence that was not amenable to such harmonization. And yet these cases are both sites at which the U.S. norms took hold. They are pivotal in the so-called "development of the Canadian model" by virtue of the approach that they adopt in deciding whether or not employers have the right to unilaterally impose drug testing policies. As we shall see below¹⁰³, this approach came to structure the justification of drug testing in terms of the balancing of employers' interests and the privacy rights of their employees. This "balancing of interests test" became one of the cornerstones of the reasoning behind Canadian model.

Before we look at the justification for testing under the Canadian model, we will take a brief look at the other way in which drug testing norms migrated from the U.S.: corporate personnel policies.

2. Migration of Drug Testing Norms by Corporate Policy

The migration of drug testing norms via the transportation industry was relatively direct. The U.S. *Railroad Regulations* and the attend-

¹⁰¹ *Id.*, p. 3, emphasis added.

¹⁰² *Id.*, p. 4. See also, *Provincial-American Transport*, *supra*, note 96 (holding that the company could not rely on the requirements of the U.S. regulations to ground authority to impose periodic drug testing on its drivers). But see, *Milazzo v. Autocar Connaissance Inc.*, (2003) 47 C.H.R.R. 468, where the Canadian Human Rights Tribunal decided that the existence of the U.S. regulations justified imposing testing on Canadian bus drivers.

¹⁰³ *Infra*, s. 3.2.1.

ant concept of "safety-sensitive positions" entered the Canadian legal landscape through direct reference to the U.S. jurisprudence (as in the *Hutchinson* and *Keal* decisions) or through their application to Canadian-based transportation workers (as in the *Bernier* and *Provincial-American Transport* decisions). However, drug testing also came to Canada indirectly through personnel policies adopted by U.S. companies and then applied to employees of their Canadian operations. This phenomenon was noted in the occupational medicine field:

"There is some concern that the drug testing policies developed in the United States are, in effect, being imposed upon Canada due to the prominent role of American-owner industry in the Canadian economy and the US rules for transportation workers that apply to cross-border transport, despite much lower frequencies of positive testing that indicate that the problem of drugs in the workplace is vanishingly small in Canada."¹⁰⁴

Tracing this process is significantly more difficult than in the case of the *Railroad Regulations*. In the latter case, we are dealing with an explicit body of state law adopted, promulgated and published in such a way as to allow for its easy identification and tracking. Corporate policies are, on the other hand, generally adopted without public consultation and promulgated by employers in multiple ways. They are rarely published; when they are, it is in a decentralized fashion lacking the citation and referencing apparatus of state law¹⁰⁵.

This is not to say that corporate policies are less important or have fewer effects than state law. Insofar as the legitimacy and efficacy of laws are related to their ability to structure expectations, create obligations and implement sanctions, corporate drug policies

¹⁰⁴ T.L. GUIDOTTI *et al.*, "Occupational medicine in Canada in 1996", (1997) 47-1 *Occupational Medicine* 45, 50. See also G. CHARLES, *Mandatory Drug Testing in Employment*, LL.M. Thesis, Dalhousie University, December 1999, p. 29, claiming "In Canada, subsidiaries of American companies have been requesting drug tests from their employees for years."

¹⁰⁵ One way in which the norms that are expressed in corporate policies migrate across organizations is through the publication of "model policies" in the specialized human resources or management literature. In the context of drug testing, see *e.g.* Barbara BUTLER, "Developing a Company Alcohol and Drug Policy", (1994) 2-3 *Can. Lab. L.J.* 484.

are arguably *more* important than state law¹⁰⁶. This does not, however, entail that they are as *visible* from an outside perspective. Thus, what we can discover about such policies is largely, though not exclusively, determined by the extent to which they come into contact with state law. The vast majority of this contact is through litigation instituted before adjudicative bodies of the state.

While the scope of this phenomenon is therefore difficult to establish, it is clear that many Canadian production facilities either had drug testing policies imposed upon them by their American head offices or parent corporations, or were required by their U.S. counterparts to formulate their own policies¹⁰⁷.

Note that from the perspective of the companies themselves, the migration of U.S. norms could be described in terms of transplant (U.S. parent companies imposing testing regimes on their Canadian operations) or harmonization (Canadian subsidiaries adopting testing in order to harmonize their personnel policies with their U.S. parent companies). But neither of these positions fully explains the phenomenon. If, as I suggest, we take the adoption of the U.S. norms by Canadian subsidiaries as “points of infection” then we are not left without an explanation for their adoption by other companies that are not engaged in transplant or harmonization. In other words, the viral metaphor allows us to ask the question of how the norms spread throughout industries after they initially took hold.

B. Principles Regulating Testing Under the Model

The early Canadian cases dealt virtually exclusively with individual grievances filed by employees who had been disciplined after either “failing” a drug test or refusing to submit to one. To the extent that the legality of testing *per se* was touched upon, it was as an incidental question to the main issue before the board of arbitration. The later cases cited in *Imperial Oil* as constituting the Canadian model dealt directly with employers’ right to test in general.

¹⁰⁶ On the idea that corporate personnel policies relating to drug testing constitute a quasi-autonomous legal order see Andrée LAJOIE, *Pouvoir disciplinaire et tests de dépistage de drogues en milieu de travail: illégalité ou pluralisme*, Cowansville, Éditions Yvon Blais, 1995.

¹⁰⁷ See *e.g.* *Trimac Transportation Services – Bulk Systems and T.C.U. (Re)*, (1999) 88 L.A.C. (4th) 237.

This appears to be the result of two interrelated processes. First, faced with a jurisprudence that required drug testing to be done in accordance with explicit policies, employers who hadn't already formalized their approach to drug testing did so by adopting detailed policies. Second, there was a change in union litigation strategy; rather than challenge drug-related disciplinary action on a case-by-case basis, unions began to overtly challenge the legitimacy of drug testing in the workplace by filing collective grievances as soon as such policies were adopted.

1. Privacy Rights and the "Balancing of Interests" Test

Though the primary basis of the initial policy challenges was an alleged violation of employees' privacy rights, they were not grounded in human rights law. Instead, unions framed their arguments in terms of traditional principles of labour law restricting employers' authority to unilaterally promulgate personnel policies in workplaces governed by a collective agreement¹⁰⁸. The applicable labour law principles were derived from the 1965 KVP case¹⁰⁹, which continues to be cited in drug testing decisions that apply the Canadian model¹¹⁰. In KVP, Arbitrator Robinson described the principles as follows:

"A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.

¹⁰⁸ This was due to the fact that it was already well-established that application of the Canadian *Charter of Rights and Freedoms* is limited to government action and thus does not apply in private litigation. The principle was confirmed by the Supreme Court in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, see esp. ¶ 26 and ff. The *Charter* is not considered in *Hutchinson*, *supra*, note 89, nor in *Keal*, *supra*, note 89, nor in *Bernier*, *supra*, note 100. In *Provincial-American Transport*, *supra*, note 96, the arbitrator clearly states that "[t]his is a case to which the Canadian Charter of Rights and Freedoms does not apply." On the role of the *Charter* in drug testing cases see Ben HOVIUS, Syd J. USPRICH & R.M. SOLOMON, "Employee Drug Testing and the Charter", (1994) 2(3) *Can. Lab. L.J.* 345.

¹⁰⁹ *Re Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co.*, (1965) 16 L.A.C. 73 (Robinson).

¹¹⁰ See e.g. *Imperial Oil*, *supra*, note 3; *Re Weyerhaeuser Company Ltd. and Communications, Energy and Paperworkers Union, Local 447 (Roberto)*, (2006) 154 L.A.C. (4th) 3 (Sims); *Re Bantrel Constructors Co. and U.A.*, *Loc. 488*, (2007) 162 L.A.C. (4th) 122 (Smith).

2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced."¹¹¹

The first drug testing case to explicitly apply KVP was rendered by Arbitrator Picher in the *Bernier* case, in which he found that the fifth principle had been violated, namely that CN employees had not been informed that "violation of the American regulation could result in the termination of [their] services, not only in the United States but also in Canada"¹¹².

But it is the second KVP criterion, that of reasonableness, which allowed for the privacy rights of employees to become a legally cognizable issue in the context of labour arbitration. In *Provincial-American Transport*, Arbitrator Brent made the analogy between employee searches and drug testing, as follows:

"There is no doubt that a carrier using the public highways must be very sensitive to safety, and that impaired drivers can jeopardize the lives and property of many others... Canadian jurisdictions have made clear policy statements indicating a desire to rid the roads of impaired drivers. Having said that, the public good does not necessarily require a wholesale disregard for personal liberty. Is there any reason then to treat the issue of drug and alcohol testing as being so different from searches to prevent employee theft – cases where the interests of the employer in safeguarding his property and the privacy interests of the employees have been balanced for years? We think not."¹¹³

He went on to determine that the policy of universal drug testing was unreasonable "even accepting the obvious safety concerns",

¹¹¹ *Re Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co.*, *supra*, note 109.

¹¹² *Supra*, note 100, p. 3.

¹¹³ *Supra*, note 96, 424, emphasis added.

since there was no evidence of a drug problem in the company nor that existing mechanisms for ensuring safety were unsatisfactory¹¹⁴.

Here we see an early reference to the structure of justification that would come to govern a key component of the Canadian model. The reasonableness of drug testing policies depends on the *balancing* of employees' privacy interests with the interests of the employer. Absent evidence that the policy is required to further the employer's interests, the privacy interest of the employees prevails. The unstated difference between employee searches and drug testing is the employer interest that is at stake; in the first case it is "safeguarding his property" whereas in the second case it is promoting safety.

This characterization of the balancing of interests test as weighing employees' privacy against safety was clearly set out in the *Esso Petroleum* case, which cites *Provincial-American Transport*¹¹⁵. Curiously, however, the larger part of the decision is guided by the decisions of the U.S. Supreme Court in *Skinner*¹¹⁶ and *Von Raab*¹¹⁷. In both of those cases, the Court's decision judged the permissibility of a practice by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"¹¹⁸. Even more curiously, Arbitrator MacAlpine's reliance on the U.S. jurisprudence has been systematically evacuated from the conventional story of the development of the Canadian model. MacAlpine's decision and the balancing of interest test in particular are commonly cited as key elements of a uniquely Canadian jurisprudence¹¹⁹.

Finally, we can see how the "balancing of interest" test arrived in Canada through various "points of infection". In addition to the

¹¹⁴ *Id.*, 425.

¹¹⁵ *Re Esso Petroleum Canada and Communications, Energy & Paperworkers Union, Local 614*, [1994] B.C.C.A.A.A. No. 244, 56 L.A.C. (4th) 440 (McAlpine), [hereinafter *Esso Petroleum*, cited to B.C.C.A.A.A.]. Note that Esso is a property of Imperial Oil.

¹¹⁶ *Supra*, note 76.

¹¹⁷ *Supra*, note 79.

¹¹⁸ *Skinner*, *supra*, note 76, 619 (citing *Delaware v. Prouse*, 440 U.S. 648).

¹¹⁹ This can be at least partially explained by the fact that the case is usually cited to a summary found in the ubiquitous L.A.C. ("Labour Arbitration Cases") reporter rather than to the full text version that appears in B.C.C.A.A.A. ("British Columbia Collective Agreement Arbitration Awards" – a Quicklaw database).

explicit reference to the U.S. jurisprudence by Arbitrator MacAlpine relies on the *Hutchinson* case (both directly, and by citing *Provincial-American Transport*, which in turn relies on *Hutchinson*). Recall, that in *Hutchinson*, which was rendered prior to the U.S. Supreme Court decisions, Arbitrator Picher describes the American *Railroad Regulations* as striking a balance between a railroad's interest in safe operations and employee privacy rights¹²⁰.

The outcome of *Esso Petroleum*, with regard to drug testing was:

- Mandatory random testing prescribed for safety-sensitive employees is acceptable in the context of rehabilitation but only for a reasonable period of time.
- Mandatory random testing prescribed for safety-sensitive employees is otherwise unacceptable.
- Mandatory testing of all employees after a significant work accident, incident or near miss is acceptable.
- Mandatory testing of all employees on the basis of reasonable and probable grounds is acceptable¹²¹.

Note that these are precisely the four circumstances under which testing is allowed in the Canadian model as it was described by Arbitrator Picher in the *Imperial Oil* case¹²². They are also virtually identical to the testing circumstances set out in the U.S. *Railroad Regulations* in 1987.

The balancing of interest test and its consequences continue to apply relatively unchanged¹²³.

¹²⁰ See text accompanying note 91, *supra*.

¹²¹ *Esso Petroleum*, *supra*, note 115, ¶ 189.

¹²² *Supra*, note 3.

¹²³ *Canadian National Railway Co. and C.A.W.-Canada (Re)*, (2000) 95 L.A.C. (4th) 341 (M.G. Picher) [hereinafter *CN & CAW*] (balancing of interests test justifies reasonable cause and post-accident testing for risk-sensitive employees); *Re Fording Coal Ltd. and United Steelworkers of America, Local 7884 (Shypitka grievance)*, (2001) 94 L.A.C. (4th) 354 (Hope) (balancing of interests test justifies subjecting an employee with a history of drug problems to random testing for a period of two years); *Re Fording Coal Ltd. and United Steelworkers of America, Local 7884 (Cryderman grievance)*, (2003) 119 L.A.C. (4th) 165 (Devine) (balancing of interests test justifies post-incident testing for those in safety-sensitive positions, but only if an investigation has first ruled out mechanical or environmental causes); *ADM Agri-Industries Ltd. v. National Automobile, Aerospace,*

2. The Curious Case of Privacy in Québec

Québec is unique among the Canadian provinces in the protection that it affords privacy interests. Unlike the various human rights codes in the other provinces¹²⁴, Québec's *Charter of Human Rights and Freedoms*¹²⁵ offers specific protection of the right to privacy. The Québec *Charter* provides:

4. Every person has a right to the safeguard of his dignity, honour and reputation.
 5. Every person has a right to the respect for his private life.
 9. Every person has a right to non-disclosure of confidential information...
 - 9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
- In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Thus, unlike the common law provinces and the federal jurisdiction, from which the majority of the arbitration jurisprudence dealing with drug and alcohol policies emanates, Québec has a statutory scheme that sets out the content of the right to privacy and the conditions under which it can be balanced with other rights.

Transportation and General Workers' Union of Canada (CAW-Canada), Local 195 (Substance Abuse Policy Grievance), [2004] C.L.A.D. No. 610 (Springate) (balancing of interest test justifies post-incident, reasonable cause, and post-rehabilitation testing). See also the four awards listed by Arbitrator Picher in *Imperial Oil*, *supra*, note 3, ¶ 100. See also Donald J.M. BROWN and David M. BEATTY, *Canadian Labour Arbitration*, 4th ed., Aurora, Canada Law Book, loose-leaf updated Nov. 2007, section 7:6152.

¹²⁴ In British Columbia, see the *Human Rights Code*, R.S.B.C. 1996, c. 2; in Alberta, see the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-14; in Saskatchewan, see the *Human Rights Code*, S.S. 1979, c. S-24.1; in Manitoba, see the *Human Rights Code*, S.M. 1987, c. H-175 (as amended); in Ontario, see the *Human Rights Code*, R.S.O. 1990, c. H.19; in New Brunswick, see the *Human Rights Act*, R.S.N.B. 1973, c. H-11; in Nova Scotia, see the *Human Rights Act*, R.S.N.S. 1989, c. 214; in Prince Edward Island, see the *Human Rights Act*, R.S.P.E.I. 1988 c. H-12; in Newfoundland and Labrador, see the *Human Rights Code*, R.S.N.L. 1990, c. H-14 (as amended).

¹²⁵ R.S.Q., c. C-12.

Insofar as the Québec *Charter* grants quasi-constitutional privacy *rights* and not common law privacy *interests*, it can be argued that the burden an employer in Québec must meet in order to justify drug and alcohol testing is stricter than that the “balancing of interests” test set out in the arbitral jurisprudence from the rest of Canada. The few cases on drug testing from Québec, however, do not appear to diverge significantly from the Canadian model¹²⁶.

The Québec Court of Appeal recently confirmed this trend in the *Goodyear* case. In that case, the union appealed a decision of the Superior Court refusing an application for judicial review of an arbitral award that confirmed the employer’s right to subject employees in “safety-sensitive positions”¹²⁷ to random and unannounced drug tests. The Court applied the *Oakes* test¹²⁸, and found that such testing was adopted in the pursuit of a legitimate objective but that there were less intrusive ways of achieving this objective¹²⁹. Random testing was therefore not allowed.

¹²⁶ See e.g. *Teamsters Québec, section locale 973 et Aliments Ultima inc.*, D.T.E. 2004T-1115 (T.A.); *SCEP s.l. 143 et Goodyear Canada Inc.* (April 12, 2005, Arbitrator D. Tremblay, unreported) aff’d *Section locale 143 du Syndicat canadien des communications, de l’énergie et du papier c. Tremblay*, 2006 QCCS 2128, [2006] R.J.D.T. 617, D.T.E. 2006T-449, quashed in part on appeal: *Section locale 143 du Syndicat canadien des communications, de l’énergie et du papier c. Goodyear Canada Inc.*, 2007 QCCA 1686 [hereinafter *Goodyear*]. Full disclosure: I was one of the attorneys who acted for the union in the *Goodyear* case.

¹²⁷ In French, “postes à risque élevé” or literally “high risk positions”.

¹²⁸ *Goodyear*, *supra*, note 126 (appeal), ¶ 18. In using the *Oakes* test to determine the scope of legitimate violations of fundamental rights by private parties, rather than the state, the Court implicitly refused to apply the distinction set out by the Supreme Court of Canada in *Syndicat Northcrest v. Anselem*, [2004] 2 S.C.R. 551 and *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256. In those cases, the Supreme Court distinguished the first and second paragraphs of s. 9.1. of the Québec Charter and found that the *Oakes* test is not the applicable standard in cases where the alleged violation of a fundamental right is not perpetrated by the state.

¹²⁹ *Id.*, ¶ 19 and 23-32. The Court skips the part of the *Oakes* test in which it must be demonstrated that there exists a rational connection between the objective (reducing workplace accidents) and the means employed (drug testing). It appears, however, that the absence of such a connection is in fact the true basis for their decision (see *esp.* ¶ 25 where the Court states: “Bien que cette usine présente un mauvais dossier en matière d’accidents du travail, aucun lien n’a été établi entre cette situation et la consommation d’alcool et de drogues.”).

In the final two paragraphs of the judgement, in what is arguably an *obiter* remark, the Court cites the passages from *Imperial Oil* that refer to the “Canadian model”, stating that it provides an “interesting comparison”¹³⁰.

C. Discrimination Against the Addicted: Real and Perceived Handicaps

An important element of any drug testing regime is the consequences that flow from a positive test. Early Canadian arbitration cases framed this question in terms of the general principles governing discipline in the workplace. These principles had already been applied to cases of employee of consumption and/or impairment at work, which existed prior to the implementation of drug testing¹³¹.

With the advent of mass drug testing in the absence of reasonable suspicion of consumption or impairment, however, concerns began to be raised that employers were thereby discriminating against drug-dependent employees. The various human rights commissions

¹³⁰ *Id.*, ¶ 33-34. This passage is disconnected from the rest of the judgement and plays no explicit role in Court’s reasoning. This absence of explanation leads me to believe that the sole purpose of the citation is to demonstrate that, even if the reasoning applicable in Québec is somewhat different than elsewhere in Canada, the result is perfectly in stride with the “Canadian model”.

¹³¹ See, e.g. *Re Brotherhood of Electrical workers Local 911 and Windsor Utilities Commission*, (1958) 8 LAC 328 (Honrahan) (drinking during lunch break does not justify suspension if the employee was not impaired at work); *Sudbury Mine Workers, Local 598 and Falconbridge Nickel Mines Ltd.*, (1962) 12 L.A.C. 270 (Thompson) (discipline is only justified if the employee’s impairment renders him or her unable to perform duties in a satisfactory way); *Re Dominion Stores Ltd. and Retail, Wholesale & Department Store Union, Local 414*, (1976) 16 L.A.C. (2d) 7 (Hinnegan) (possession of marijuana on company premises justifies a four-month suspension but not discharge); *Firestone Steel Products of Canada and United Automobile Workers, Local 27*, (1977) 17 L.A.C. (2d) 185 (Rayner) (impairment by marijuana while at work justifies discharge); *Re Indalloy, Division of Indal Ltd. and United Steelworkers, Local 2729*, (1979) 22 L.A.C. (2d) 202 (Kennedy) (possession of marijuana with the intent to consume it at work does not justify discharge but does justify a five-month suspension); *Re Steel Company of Canada Ltd. and United Steelworkers*, (1979) 14 L.A.C. (2d) 405 (Rayner) (marijuana consumption at work justifies discharge); *Re Air Canada and International Assoc. of Machinists*, (1976) 10 L.A.C. (2d) 346 (Morin) (habitual off-duty marijuana use is not grounds for discipline absent evidence of impairment at work).

were apparently the first to raise this issue¹³². In *Provincial-American Transport*, Arbitrator Brent remarked:

"This is a case to which the Canadian *Charter of Rights and Freedoms* does not apply. Further, we were not cited any decisions of either the Canadian Human Rights Commission or the Ontario Human Rights Commission regarding drug testing. *Based on the policy papers from those bodies which were filed with us, it would appear that their view is that evidence of a particular problem would be required before drug and alcohol testing would be countenanced under existing human rights legislation.*"¹³³

The application of anti-discrimination law to drug-testing policy was eventually decided by the Federal Court of Appeal in the 1998 *TD Bank* case¹³⁴ and the Ontario Court of Appeal in 2000 *Entrop* case¹³⁵. As we shall see, these cases deploy different reasoning to come to the same conclusions as the arbitral jurisprudence. Unsurprisingly, the decisions were easily integrated in the Canadian model.

1. Human Rights Decisions by the Higher Courts

The *TD Bank* case arose after the Toronto Dominion Bank adopted a new drug testing policy in 1990. In his decision, Roberston, J.A. describes the policy as follows:

"[The policy] requires all new and returning employees to submit to a urine drug test within 48 hours of accepting an offer of employment. This requirement is printed on the Bank's application for employment form which states that it is a condition of employment that a person undergo drug testing for "illegal substances"...

¹³² See e.g. CANADIAN HUMAN RIGHTS COMMISSION, *The Canadian Human Rights Commission Policy on Mandatory Drug Testing*, Ottawa, CHRC Research & Policy Branch, 1987 [Policy 88-1]; ONTARIO HUMAN RIGHTS COMMISSION, *Policy on Drug and Alcohol Testing* (1996); Claire BERNARD, *La compatibilité avec la Charte québécoise des tests de drogue en emploi*, Québec, Commission des droits de la personne et droits de la jeunesse [document officiel Cat.2.120-12.13], 1998.

¹³³ *Supra*, note 96, 426.

¹³⁴ *Canada (Human Rights Commission) v. Toronto-Dominion Bank*, 1998 CanLII 8112 (F.C.A.), [1998] 4 F.C. 205, 163 D.L.R. (4th) 193, 32 C.H.R.R. 261, 38 C.C.E.L. (2d) 8 [hereinafter *TD Bank*].

¹³⁵ *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (Ont.C.A.), 50 O.R. (3d) 18, 189 D.L.R. (4th) 14, 2 C.C.E.L. (3d) 19, 37 C.H.R.R. 481, 137 O.A.C. 15 [hereinafter *Entrop*, cited to CanLII].

New or returning employees who refuse to submit to the drug test are dismissed for failing to comply with a condition of employment. Employees who test positive and are drug dependent, may lose their employment if they refuse to take advantage of the rehabilitation services made available to them or if rehabilitation efforts prove unsuccessful. So-called casual users of illicit substances, that is non-dependent drug users, may also lose their employment if they persist in using such drugs after having tested positive on at least three occasions..."¹³⁶

The Canadian Civil Liberties Association (the "CCLA") saw this as a violation of the *Canadian Human Rights Act*¹³⁷, which specifically prohibits employment discrimination on the grounds of "... previous or existing dependence on alcohol or a drug"¹³⁸. The CCLA filed a complaint with the Canadian Human Rights Commission, which in turn seized the Canadian Human Rights Tribunal. The case eventually made its way to the Federal Court of Appeal via a decision by a Federal Court motions judge on an application for judicial review of the Tribunal's decision.

Robertson, J.A., found that the policy was discriminatory, since "[a]n employment policy aimed at ensuring a work environment free of illegal drug use must necessarily impact negatively on those who are drug dependent"¹³⁹. Furthermore, the discrimination could not be justified because it was neither reasonably necessary, nor rationally connected to job performance¹⁴⁰.

¹³⁶ *TD Bank, supra*, note 134, ¶ 6-7.

¹³⁷ R.S.C. 1985, c. H-6. The reason that federal legislation applies is that banks, including their employment relationships, fall under the federal jurisdiction by virtue of s. 91(15) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

¹³⁸ *Id.* The definition of disability is found at s. 10. Section 3(1) includes disability as a "prohibited ground" of discrimination, and s. 10 sets out the definition of a "discriminatory practice" in employment.

¹³⁹ *TD Bank, supra* note 134, ¶ 24. Note that the judgement contains three different sets of reasons. Robertson, J.A., found that the policy was directly discriminatory and in the alternative that it constituted unjustified indirect discrimination; McDonald, J.A., found that the policy constituted unjustified indirect discrimination; Isaac, C.J., dissented, finding that if the policy were indirectly discriminatory it was justified on the grounds that being free from drugs is a *bona fide* occupational requirement.

¹⁴⁰ The "reasonably necessary" and "rational connection" tests were, at the time of the judgement, distinct tests used to determine whether a practice that is *prima*

McDonald, J.A., in his concurring opinion, found that the policy constituted indirect discrimination since the neutral rule ("employees must be drug-free") had more serious consequences for a group that is protected under the *Human Rights Act* (drug dependent employees)¹⁴¹. He continues, finding that such a policy could be truly neutral (*i.e.* not cause adverse effects to a protected group) in some circumstances. The circumstances he cites are cases where the policy is implemented in a "safety sensitive industry". He writes:

"For instance, a policy aimed at achieving a drug and alcohol free work place can be neutral if it is concerned with work performance and seeks to rehabilitate those whose work performance has been affected as a result of their drug dependency. *Indeed, drug testing in safety sensitive industries is allowed and pursued. The concern, therefore, should be to ensure that the policy is designed to meet the requirements of the CHA [Canadian Human Rights Act] rather than with banning these policies altogether...*

*It is relatively easy to imagine a situation where a drug testing policy would likely be upheld: one is in a safety sensitive industry that has a policy of drug testing for cause (where an employee's work performance has been affected by drugs.) Having established this is a valid BFOR [bona fide occupational requirement] defence, there is no duty to accommodate: the disabled person can be dismissed."*¹⁴²

Thus, in a case involving discrimination, where the governing legal principles and applicable legislation are radically different from those applicable to privacy in the context of a collective bargaining relationship, the Federal Court of Appeal comes to precisely the same conclusion as the arbitration jurisprudence: drug testing is justified when it is implemented in a safety sensitive industry, and then, only for cause.

A similar result was arrived at in the *Entrop* case¹⁴³. In that case, Imperial Oil's drug and alcohol policy was challenged by Mr.

facie discriminatory is nevertheless justified. Since the Supreme Court abandoned the distinction between direct discrimination and indirect or "adverse effect" discrimination in *Meiorin*, *supra*, note 4, there is now only one test.

¹⁴¹ *TD Bank*, *supra*, note 134, ¶ 4.

¹⁴² *Id.*, ¶ 11-12, emphasis added.

¹⁴³ *Supra*, note 135. The relationship between *Entrop* and *TD Bank* is complex. The Ontario Human Rights Commission Board of Inquiry had rendered an initial decision in *Entrop* by the time that the *TD Bank* decision was rendered, and that

Entrop, who filed a complaint with the Ontario Human Rights Commission. The facts that led to the litigation were simple:

"The respondent Martin Entrop suffered from alcohol abuse in the early 1980s. Although he had not had a drink for over seven years, because he worked in what Imperial Oil classified as a safety-sensitive job, the Policy required him to disclose his previous alcohol abuse problem to management. When he disclosed it, he was automatically reassigned to another job."¹⁴⁴

The Board of Inquiry appointed by the Ministry of Labour expanded the scope of its inquiry to include with all aspects of the policy, ultimately deciding that policy's provisions for drug and alcohol testing were in violation of the *Ontario Human Rights Code*¹⁴⁵. By the time it had reached the Ontario Court of Appeal, the question of the legality of testing had become the primary issue.

Though the *Ontario Human Rights Code* does not specifically reference addiction in the way that the *Canadian Human Rights Act* does, the Court upheld the Board's finding that substance abuse is a handicap. Furthermore, the *Ontario Human Rights Code*, prohibits discrimination against anyone who "has or has had, or is believed to have or have had" a handicap¹⁴⁶. This caused the court to remark:

"Thus, though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the Policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser... Imperial Oil applies sanctions to any person testing positive – either refusing to hire, disciplining or terminating the employment of that person – on the assumption

decision is cited by the Federal Court of Appeal. However, the procedural complexities of *Entrop* (where the Board rendered eight distinct decisions) resulted in the appeal being heard after *TD Bank* was rendered. So *TD Bank* is cited in the Ontario Court of Appeal's decision in *Entrop*.

¹⁴⁴ *Entrop*, *supra*, note 135, ¶ 2.

¹⁴⁵ R.S.O. 1990, c. H.19, as amended. Compare *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426 (CanLII), where the Alberta Court of Appeal refused to declare illegal a drug testing policy on the grounds that the individual complainant was not handicapped and that the Human Rights Panel was not validly seized of a general complaint that allowed for a decision on the general validity of the impugned policy.

¹⁴⁶ *Id.*, at ss. 5(1) and 10.

that the person is likely to be impaired at work currently or in the future, and thus not “fit for duty.” Therefore, persons testing positive on an alcohol or drug test – perceived or actual substance abusers – are adversely affected by the Policy. The Policy provisions for pre-employment drug testing and for random alcohol and drug testing are, therefore, *prima facie* discriminatory. Imperial Oil bears the burden of showing that they are *bona fide* occupational requirements.”

The “*bona fide* occupational requirement” test to which the Court refers here had undergone some refinement since *TD Bank*, where two distinct tests (the “reasonably necessary” test and “rational connection” test) were applied¹⁴⁷. These tests were premised on the distinction between direct and indirect (or adverse effect) discrimination; a distinction that was jettisoned. Since 1999, the courts apply a “unified approach” that imposes a single test to determine whether a *prima facie* discriminatory employment standard is justified:

“An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”¹⁴⁸

In *Entrop*, the Court found that the purpose of the policy was to promote workplace safety and that reducing workplace impairment was rationally connected to that objective. It also found that Imperial Oil honestly believed that its policy was necessary to meet this objective. The real question for the Court was thus whether drug testing was reasonably necessary.

¹⁴⁷ *Meiorin*, *supra*, note 4. See also *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385 [hereinafter *Grismer*].

¹⁴⁸ *Meiorin*, *supra*, note 4, ¶ 54.

The Court found that random testing was *not* reasonably necessary for the simple reason that urinalysis drug testing is unable to detect current impairment. Since a positive test tells the employer nothing as to the employees' capacity to do the job safely, testing cannot be reasonably necessary to promote workplace safety¹⁴⁹. Furthermore, termination of employment after a positive test is far more drastic than is necessary – Imperial Oil had not shown that it was impossible to adjust its sanctions in order to accommodate drug-dependent employees¹⁵⁰. Both of these arguments were also applied by the Court to pre-employment testing¹⁵¹.

The Court also endorsed the Board's finding that testing based on reasonable suspicion and after an accident or incident (as part of a "larger assessment") were justified¹⁵².

2. Integration in the Model by Arbitrators

The conclusion of *TD Bank* and *Entrop* is ultimately that random drug testing and mass pre-employment screening are unjustified under anti-discrimination statutes. Both, however, allow testing for employees in safety-sensitive positions. *Entrop* specifically sets out that such testing is allowable on the basis of reasonable suspicion and as part of a post-incident or accident investigation. Once again, we see that testing is allowed under the same conditions as the initial U.S. *Railroad regulations*. It was therefore easy for the "new" anti-discrimination reasoning governing drug testing to be integrated into the Canadian model, which itself is basically identical to the U.S. system. Arguably then, the structure of justification in Canadian human rights law is a feature of Canadian law that makes it an amenable host to the drug testing virus; or conversely, Canadian human rights law does not immunize the legal system against the drug testing virus.

This process of integration occurred rapidly in the years following *TD Bank* and *Entrop*. In *CN & CAW*¹⁵³, Arbitrator Picher cites *TD*

¹⁴⁹ *Entrop*, *supra*, note 135, ¶ 99.

¹⁵⁰ *Id.*, ¶ 100-102.

¹⁵¹ *Id.*, ¶ 99.

¹⁵² *Id.*, ¶ 114.

¹⁵³ *Supra*, note 123.

Bank at length, as well as the lower tribunal rulings in *Entrop*. Hearings in the case ended two days prior to the release of the Court of Appeal decision in *Entrop*. By the time Arbitrator Picher rendered *Imperial Oil*, the reasoning on discrimination was clearly described as a key component of the Canadian model.

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* *

As we have seen, the Canadian model, which appears to develop over a period of twenty years, remains virtually static in terms of the conditions under which it allows for drug testing. It also maps quite closely the model for testing adopted in the U.S., especially with regard to the role that “safety-sensitive” positions or industries play in its justification.

One of my central arguments has been that this similarity is not a matter of accident, nor a simple contingent result of two relatively similar legal systems dealing with the same subject matter. Rather, the norms of the Canadian model migrated from the U.S. at multiple points of contact and then spread across the Canadian jurisprudence. I proposed the metaphor of a viral infection to describe this process of migration. This provides a more convincing explanation than a description that relies on transplant of the American norms or efforts to harmonize U.S. and Canadian law. I insist, however, that at this stage, the viral explanation is a metaphor; it is neither a model nor a theory. Recently, a small number of other authors have also mobilized the viral metaphor to describe the migration of legal norms¹⁵⁴, but – to my knowledge – it has not been systematized. It remains to be seen whether the analytical tools of epidemiology can be systematically brought to bear on the problem of the migration of legal norms.

The viral metaphor allows us to pose the question as to the suitability of the “host” legal system as an environment for the migrating norms, though admittedly harmonization and transplant explanations allow for similar reflection. For instance, the “balancing of interests” test that constitutes one prong of the Canadian model, is

¹⁵⁴ See Spencer Weber WALLER, “The Chicago School Virus” (2007), working paper available at <<http://ssrn.com/abstract=1017882>>. See also, Gil GRANTMORE, “The Phages of American Law”, (2002) 36 *U. C. Davis L. Rev.* 455; Richard Michael FISHL, “The Epidemiology of Critique”, (2003) 57 *U. Miami L. Rev.* 475.

undeniably a direct descendent of the U.S. jurisprudence (and Arbitrator Picher's interpretation of the *Railroad Regulations*). The transposition of the reasoning, however, was apparently facilitated by the existence of a similar doctrine in the Canadian arbitral jurisprudence governing employee searches. The other prong, the "*bona fide* occupational requirement" test, is clearly derived from Canadian human rights jurisprudence. What is striking, however, is that they lead to the same result in terms of what kind of testing can be imposed on whom and when.

One aspect of the viral metaphor that I have not explored, but that bears further analysis, is the importance of carriers. While the potential for transmission will depend in part on the hospitality of the "host" legal system to the migrating norms, it will also depend on having an amenable carrier. Paying increased attention to the carrier allows one to shift the focus from legal *structure* to legal *agency*. Astute readers will have noticed that a large proportion of the jurisprudence that constitutes the Canadian model was rendered by Arbitrator Picher. This raises the question as to whether a favourable predisposition towards or familiarity with American law could have made him a particularly efficient carrier. As it turns out, before becoming an arbitrator, Picher pursued graduate work in law at Harvard. I am not suggesting an explanation based purely on the psychology of legal actors, but merely pointing out that a satisfying description of the migration of legal norms using the viral metaphor must account for the role of carriers.

Another datum to be explained is the extent to which a norm *fails* to migrate. For instance, one important distinction between the Canadian model and the current norms governing drug testing in the U.S. is that in the former random testing is unacceptable, whereas in the latter it is allowed. This can be explained by the fact that the key moments in the migration of the drug testing norms occurred before random testing was adopted in the U.S. This tends to indicate that the migration was not continuous, but rather stopped (or at least diminished) once the number of Canadian decisions was sufficient to ground an autonomous jurisprudence. Keeping with the viral metaphor, we can say that a different "strain" developed and that it immunized the Canadian jurisprudence from further infection by the original virus.

Though I have shown two ways in which this U.S. justification became a reason for implementing testing in Canada, it remains

unclear how the truth of the proposition that drug testing reduces accidents came to be accepted. What little references exist to the actual relationship between drug use and accidents in Canada appear simply to defer to U.S. research. One possible explanation for this is based on the way in which the model came to Canada. The relationship between drug use and accidents – and the efficiency of drug tests in reducing accidents – came to be true within the discourse of the law in the U.S. It was legal discourse that migrated north and it seems that this discourse brought its truths with it.